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THE

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Indian Appeals :

BEING

CASES

IN

THE PRIVY COUNCIL

ON APPEAL FROM

THE EAST INDIES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
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1907.

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CASES

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ON APPEAL FROM

The East Indies.

NAWAB SHAH ARA BEGAM AND OTHERS . DEFENDANTS ;

AND

NANHI BEGAM AND ANOTHER . . . . . PLAINTIFFS.

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July 7 ;
Nov. 1.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Limitation Act, 1877, *s.* 7—*Evidence as to Date of Plaintiff's Birth.*

Where a question of limitation depended, under s. 7 of the Limitation Act, 1877, on the plaintiff's attainment of majority within three years next before suit, their Lordships, while fully recognizing that in India it is difficult to prove such facts as the date of birth after a lapse of many years, *held*, that the amount of evidence required must nevertheless be such as to carry reasonable conviction to the mind.

APPEAL from a decree of the Judicial Commissioner (September 28, 1900), reversing a decree of the Subordinate Judge of Lucknow (October 13, 1898).

The Subordinate Judge's judgment contained the following :—

"The plaintiff claims a share in the estate of her father, Darogha Mir Wajid Ali, who died on December 14, 1876, when, the plaintiff was a minor. The ordinary period of limitation,

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computing from the original cause of action, expired during her minority. She claims exception from that period under the last paragraph of s. 7 of the Indian Limitation Act XV. of 1887, by virtue of which she can sue within three years from the cessation of her disability as a minor. Under the Indian Majority Act IX. of 1875, s. 3, paragraph 1, she would be deemed to have attained her age of majority on the completion of her twenty-first year."

On the evidence he found that the plaintiff was born sometime at the close of 1871, and attained the age of majority at the end of 1892. The suit was brought in August, 1896, i.e., after three years from her majority, and therefore was barred.

The Court of the Judicial Commissioner said :—

"As to the date of the plaintiff's birth and the date on which she attained her majority, it is now urged that in drafting the plaint, the 1st Zikada, 1289 Hijri, was by mistake inserted for the 1st Zikada, 1290 Hijri, which corresponds to December 22, 1873, the fact that there were two months of Zikada in that year having been overlooked. It is said that the plaintiff attained her majority on September 4, 1894, so that on calculation her birth was in 1873, but the first month of Zikada in that year was wrongly taken as that in which her birth occurred."

They came to the conclusion that the plaint contained a mistake, and that on the evidence December 22, 1873, was the date of the plaintiff's birth.

De Gruyther, for the appellants.

C. W. Arathoon, for the respondent Nanhi Begam.

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Nov. 1.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This appeal raises a single question of fact, upon which the Courts in India have differed. The suit was brought on August 29, 1896, and the object of the suit was to recover the share to which the plaintiff (the first respondent) claimed to be entitled in the estate of her father Darogha Mir Wajid Ali, a Mahomedan of the Shiah sect. Her title was disputed upon many grounds not now in question. The only

controversy left is as to whether the suit was barred by limitation. It was undoubtedly barred unless the plaintiff is entitled to the extension of time allowed by s. 7 of the Indian Limitation Act, 1877. The plaintiff during her minority was under the guardianship of her mother, whereby the period of minority was extended to twenty-one years; and the section just referred to gave her three years from the date at which she attained her full age within which to bring her suit. The question, therefore, is whether she has shewn by sufficiently trustworthy evidence that she came of age within three years before commencing her suit. And that is the question on which the Courts in India differed.

There are a few facts, and some dates, about which there is no doubt. The plaintiff's mother Moghal Jan lived for some years under Mutah marriage with Darogha, but on September 11, 1874, he married her by Nikah. Before the latter date she bore him a number of children, of whom some are said to have died in infancy, whilst three, a son and two daughters, survived, the plaintiff being the youngest of the three. Darogha died on December 14, 1876.

On June 21, 1871, Darogha executed a codicil to his will, by which he shewed that he had already made provision in the will for the son of Moghal Jan, Amir Hasan by name, and now made provision for Munni Begam, the elder of the two daughters; and the will is framed in terms which have been rightly held to shew that at that time the plaintiff was not yet born.

On May 29, 1875, Darogha made another will, in which he made provision for the plaintiff, as well as for her brother and sister. Thus it is clear that the birth of the plaintiff took place between June 21, 1871 and May 29, 1875. But, unfortunately, that is almost the only thing that is clear. The plaintiff's case, as stated in paragraph 7 of her plaint, was that she attained her age of twenty-one years on January 1, 1894, which would make the date of her birth to be January 1, 1873, and that is the date of birth sworn to by all her witnesses.

Her witnesses were three in number, her mother Moghal Jan, her brother of the whole blood Amir Hassan, and her half-brother Tasadduk Husain, a son of Moghal Jan by a previous husband.

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The mother said that the plaintiff was in her twenty-sixth year at the date when she gave her evidence. She said that the plaintiff was born on the 1st of the month Zikad; she added, "on the 1st Zikad of every year I tie a knot in a thread to celebrate her birthday. . . . . I have already tied twenty-five knots in that thread."

In cross-examination she said that at the date of the Nikah the plaintiff was in her second year, but almost immediately afterwards she said that at that date the plaintiff " was in the fourth year, a month less, it may be; three knots had already been tied." The examination of this witness was taken before a Commissioner, and it appears that an interval of several hours occurred before her re-examination, and then she sought to explain the contradiction in her previous evidence by saying, " When my Nikah took place she was in her second year and she was about four at the time of Daroga Wajid Ali's death.' Amir Hasan declared that at the time he was speaking the plaintiff was aged twenty-five years and five months. He followed his mother in saying that the last knot tied on the plaintiff's thread was the twenty-fifth, and in saying that the plaintiff was about four years old at the death of their father. He further confirmed his mother in saying that a thread with knots was kept to shew his own age, similar to that of his sister. Tasadduk repeated the story about the practice of tying knots, and also said the plaintiff was about two years old at the time of the Nikah. That is the whole of the plaintiff's evidence.

Their Lordships fully recognize that in India it is difficult to prove such facts as the date of birth, after a lapse of many years, and that it would be unreasonable to require such a class of evidence as would justly be demanded in this country. But the evidence must be such as to carry reasonable conviction to the mind. The evidence for the plaintiff is not only extremely scanty in amount, but extremely unsatisfactory in character. Moghul Jan directly contradicted herself as to the age of the plaintiff at the date of the Nikah. The story about the knots on the thread, indicating the plaintiff's age, broke down, because both mother and son said the knots tied were twenty-five in number, whereas if the birth took place at the time alleged, they

ought to have been twenty-six. A like story was told about the knots on Amir Hasan's thread indicating his present age. That story is entirely inconsistent with the statement of his age in his petition for cancellation of the certificate of guardianship, dated November 1 and 2, 1887.

The case on the other side was that the plaintiff was born in the latter end of 1871. In support of that case there were also three witnesses called of whom it is enough to say that their evidence is as unsatisfactory as that of the plaintiff's witnesses.

The Subordinate Judge, who tried the case, came to the conclusion that the plaintiff had failed to prove her story as to the date of her birth. He further thought that it was shewn that the birth took place at the end of 1871, and he dismissed the suit. The Court of the Judicial Commissioner on appeal reversed that decision, and thought that on the evidence the plaintiff's suit was shewn to be in time. But the Court came to that conclusion by adopting a suggestion, apparently made for the first time in that Court, that confusion had been made between the 1st Zikad 1289, corresponding to January 1, 1873, and the 1st Zikad of the next Mahomedan year, corresponding to a later date in the same English year 1873.

This point is purely one of fact, and there is no evidence to support it. If it had been put forward by the witnesses, and they had said that they had been thus misled, it might have carried weight; on the other hand, it might have been displaced by cross-examination. It appears to their Lordships very dangerous to adopt such a conclusion in a Court of Appeal, merely on the suggestion of the legal gentlemen representing one of the parties. The Court of the Judicial Commissioner further considered that some of the witnesses for the defence tended to support the plaintiff's case, but it appears to their Lordships that that evidence is too vague and unsatisfactory to lend material support to either case. Their Lordships agree with the Subordinate Judge to the extent of holding that the plaintiff has failed to prove that she attained her full age within three years before the commencement of the suit.

Their Lordships will humbly advise His Majesty that the

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decree of the Judicial Commissioner's Court should be discharged with costs. The first respondent will pay the costs of the appeal.

Solicitors for appellants : *Watkins & Lempriere.*

Solicitors for respondent No. 1 : *T. L. Wilson & Co.*

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GOSWAMI SRI GHANSHIAM LALJI . . . DEFENDANT;

AND

RAM NARAIN . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT FOR THE NORTH-WESTERN PROVINCES.

Negotiable Instruments Act, 1881, *s.* 80—*Collateral Agreement to pay Interest—Construction.*

Sect. 80 of the Negotiable Instruments Act (XXVI. of 1881) confers a right to interest in the absence of any specified rate, but does not take away a right otherwise existing by contract.

Where hundis were silent as to interest, but there was a collateral agreement (effective in this case) granting interest at a specified rate :—

Held, that the above section did not apply.

APPEAL from a decree of the High Court (January 19, 1903), affirming a decree of the Subordinate Judge of Agra (June 8, 1900).

The question decided was as to the construction and effect of s. 80 of Act XXVI. of 1881 with reference to six hundis in the vernacular drawn by the appellant on himself in favour of the respondent, payable at Muttra, all of them silent as to interest.

The suit was to recover Rs. 5,600 as principal and Rs. 4,938 as interest at 30 per cent. per annum alleged to be due on the said hundis. Both Courts found in favour of the respondent that the parties had agreed that interest at 30 per cent. per annum should be paid, and that such agreement was admissible in evidence under s. 92, proviso 2, of the Indian Evidence Act, and was

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valid and operative. They also held that s. 80 of Act XXVI. of 1881 was inapplicable to the case. The High Court certified, under s. 595, clause (*c*), of the Civil Procedure Code, that it was a fit case for appeal, the amount of business done in hundis in the country rendering it desirable that the law in regard to them should be settled.

A. M. Dunne, for the appellant, contended that the true effect of s. 80 of Act. XXVI. of 1881 is to add to the hundis in suit as negotiable instruments a clause entitling the holder to 6 per cent. interest per annum and no more. The collateral agreement in this case for interest at 30 per cent. was not admissible in evidence under the Evidence Act, s. 92. Such a stipulation was an addition to the terms of the instrument upon a matter provided for by the Act of 1881, and was, moreover, inconsistent both with the Act and the hundis. It was contended that it was therefore inoperative and invalid, and that s. 80 precluded a higher rate of interest than 6 per cent. Reference was made to ss. 1 and 79 of the Act of 1881, and to the Interest Act (XXXII. of 1839).

The respondent did not appear.

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The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The suit out of which this appeal arises was brought upon six hundis drawn by the defendant (appellant) upon himself in favour of the plaintiff (respondent). The hundis were silent as to interest ; but there was a collateral agreement, embodied in written documents, that the hundis should bear interest at a rate equivalent to 30 per cent. per annum. And it has been held that the dealing with interest by a collateral agreement, and not on the face of the hundis, was in accordance with the custom prevailing in the district, and amongst the class, affected by this suit.

The contention of the appellant was that, notwithstanding the agreement of the parties, the respondent's right to interest was restricted to 6 per cent. by s. 80 of the Negotiable Instruments Act, XXVI. of 1881. Both the Courts in India rejected this contention, and their Lordships think rightly.

The section says : " When no rate of interest is specified in

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the instrument, interest on the amount due thereon shall, except in cases provided for by the Code of Civil Procedure, section 532, be calculated at the rate of six per centum per annum, from the date at which the same ought to have been paid by the party charged, until tender or realization of the amount due thereon, or until such date after the institution of a suit to recover such amount as the Court directs.

"Explanation :—When the party charged is the indorser of an instrument dishonoured by non-payment, he is liable to pay interest only from the time that he receives notice of the dishonour."

In 1855, by Act XXVIII. of that year, the usury laws previously in force were repealed, and the general rule was laid down that "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." Sect. 80 of the Negotiable Instruments Act does not purport to deprive those dealing with such instruments of the freedom of contract possessed by other contracting parties. It purports to confer a right to interest, not to take away such a right otherwise existing. When a plaintiff has to rely upon the section as the ground of his claim to interest, no doubt the terms of the section must be followed. But to read the section as depriving him of a contractual right of interest would be to read into it something which it does not say, and which cannot reasonably be implied from its language.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The respondent not having appeared, there will be no order as to costs.

Solicitors for appellant : *Morgan, Price & Mewburn.*

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AND

RAI SHAM KRISHEN AND OTHERS . . . PLAINTIFFS. *Oct.* 30; *Nov.* 1; *Dec.* 14.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

CONSOLIDATED APPEAL AND CROSS APPEAL.

Mortgagor and Mortgagee—Undue Influence—Indian Contract Act, 1872, *ss.* 16, 74—*Act VI. of* 1899, *ss.* 2, 4—*Stipulation for increased Interest—Compound Interest—Penalty—Rate of Compensation—Transfer of Property Act*, *ss.* 86, 88—*Six per Cent. on Amount found Due.*

Where in a suit to enforce two mortgage bonds there was no evidence of any actual exercise of undue influence by the mortgagees, or of any special circumstance from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money:—

Held, that this circumstance is not sufficient of itself to place the mortgagees in a position "to dominate the will" of the mortgagor within the meaning of s. 16 of the Indian Contract Act, 1872, as amended by Act VI. of 1899, s. 2.

Dhanipal Das v. *Raja Maneshar Bakhsh Singh*, (1906) L. R. 33 Ind. Ap. 118, distinguished.

In default of payment of interest, both bonds stipulated that additional interest should be paid by the mortgagor from the date of their execution, both by increase of the general rate and by the increased rate of the compound interest; but at the date of the execution of the second bond there was a settlement of accounts as regards the interest due on the first bond, and simple interest only was charged, the amount being included in the principal of the second bond:—

Held, that the stipulation for increased interest, being retrospective and not merely from the date of default, was a penalty within the meaning of s. 74 of the Indian Contract Act as amended by Act VI. of 1899, s. 4; but that under the Act reasonable compensation not exceeding the amount of the penalty was payable by the mortgagor. Their Lordships approved the concurrent findings of both Courts that the compensation should be at the same rate as the increased interest stipulated for; and also the direction of the High Court that in the case of the first bond it should run from the date of the execution of the second bond, and in the case of the second bond it should run from the date of default of that bond, compound interest being allowed only at the rate at which simple interest was stipulated for.

Held, also, that on the true construction of ss. 86 and 88 of the Transfer

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of Property Act and the Rules of Court made under s. 104, the High Court was right in allowing 6 per cent. interest only, and not the mortgage rate of interest on the aggregate amount found due from the date fixed for redemption until realization.

CONSOLIDATED appeals from a decree of the High Court (June 13, 30, 1901), varying a decree of the Subordinate Judge of Patna (May 31, 1900, amended on August 28, 1900).

The plaintiffs in the suit sought to recover Rs. 11,33,141.13 with interest until realization and costs of suit, and sale of the property of the defendant under two mortgage bonds, executed by the defendant to the plaintiffs Rai Sham Krishen and Mussamat Rani Latto Koer, for the benefit of themselves and the other plaintiffs, who were all members of a joint Hindu family. The first of the two bonds was dated June 19, 1888. It was executed by Raja Rameswar Pershad Narain Singh for an expressed borrowing of Rs. 4,35,000 from the plaintiffs (respondents). It stipulated that interest upon the amount advanced should be paid at 14 annas per cent. per mensem (or 10½ per cent. per annum), with six monthly rests. On the failure to pay interest at the expiration of each six months, the Raja was to pay compound interest at the increased rate of R. 1-8 annas per cent. per mensem, equivalent to 18 per cent. per annum. On failure of payment of interest for one year, then interest was to run on the principal at 1 per cent. per mensem (instead of the 14 annas per cent. per mensem), and this was to be from the date of the bond. Further, there was a stipulation that interest should be calculated according to the Hindi calendar, which includes thirteen months in each year.

The second bond was dated June 15, 1901. The stipulations therein were similar, except that the rate of interest was 12 annas per cent. per mensem instead of 14 annas. This bond was given for Rs. 1,65,000. That amount was made up as follows: Due for interest under the first mortgage, Rs. 69,143; due under an intermediate mortgage of February 22, 1889, for principal and interest, Rs. 20,008; and, said to be advanced at the time of the execution of this mortgage bond, Rs. 75,847. Those three items added together made up the loan for which the second bond, on which the suit was based, was given. The defendant in his

written statement did not dispute his execution of the two bonds; but he denied that he had received the full amount of consideration, and disputed his liability to compound interest and interest on default. He charged that, of the amounts appearing in the bonds, he had not received Rs. 35,000 out of the sum of Rs. 4,35,000 in the first bond, and Rs. 20,000 out of the sum of Rs. 1,65,000 in the second bond. He also alleged that the interest on the first bond was incorrectly stated in the second bond, where it was stated to be Rs. 69,143. He pleaded that (1.) the provision for payment of 1 per cent. per mensem from the date of execution of the bonds, in case of default in payment of interest within any year and (2.) the provisions for an enhanced rate of interest and for interest upon interest were penal and could not be enforced. He also denied that he agreed to pay interest on interest at all. And he alleged that the mention of such interest in the bonds was made "as a matter of threat," and further that the plaintiffs agreed not to take interest on interest; and that he had never paid such interest on interest, nor had his payments been credited against such interest on interest. He further disputed that interest was covered by the mortgages; and objected to its being charged for intercalary months. He set up that he had been unduly influenced by the plaintiffs to execute the bonds; and asked to be allowed to pay what was due by instalments.

With regard to the said sums of Rs. 35,000 and Rs. 20,000 stated to have been withheld out of the respective considerations of the two bonds, the evidence shewed that Rs. 8,700 and Rs. 3,300 had been deducted as commissions on the said loans.

The Subordinate Judge disallowed the claim of the defendant as to the sums of Rs. 35,000 and Rs. 20,000 with the exception of Rs. 8,700 and Rs. 3,300 for commission at 2 per cent., which he allowed. He based his allowance of the sums of Rs. 8,700 and Rs. 3,300 upon what he held to be an equitable principle of English statutory law. The High Court considered "that the defendant understood perfectly well that the two sums of Rs. 35,000 and Rs. 20,000 out of the consideration of the two bonds were kept back in payment of the carriage and horses, the Kinkhab cloth, and commission to the plaintiffs, and, however

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reluctant to agree to this being done, yet he did agree to these sums being retained and disposed of in these ways, and did, consciously and knowingly, admit the receipt of the full consideration of the two bonds. This is apparent from the evidence on both sides. The evidence on this point on the defendant's side is most significant." And they quoted the evidence, and disallowed the entire claim, including the sums allowed by the Subordinate Judge.

Both Courts held that the defendant agreed to the stipulations for higher rates of interest and compound interest; that they were not an empty threat; that the plaintiffs did not promise not to enforce them. And they concurred in holding that the higher rate of interest stipulated for on default in payment of interest at the end of one year was a penal stipulation, but they also concurred in allowing the same rate as compensation; the High Court, however, dissenting from the Subordinate Judge as to the period for which it should run. The Subordinate Judge had allowed it from the respective dates of the bonds. The High Court restricted it to the period from the date of the second bond.

The Subordinate Judge had allowed compound interest at Rs. 1-8 per cent. per mensem, the contract rate. The High Court held this to be a penal rate, and reduced it to the same rates as the rates of the contracts for simple interest.

The Subordinate Judge had calculated the interest on the principal sums at the contract rate until realization, but at 6 per cent. per annum only, from the end of six months after the date of his decree on the interest and costs. The High Court said that "The Subordinate Judge was right in allowing the contract rate of interest, but that this rate should be allowed only up to the date fixed by our decree in this case for the repayment of the bond debts, i.e., up to three months from the date of our decree, and that after that date interest should run at the rate of 6 per cent. only." And, "The Subordinate Judge has given no reason for allowing the contract rate only on the principal amounts up to date of realization, and for disallowing compound interest and compensation for default in payment of the interest. It appears to us that they should be allowed up to the date on which we

allow the contract rate of interest to run on the principals of the bonds."

In the result the High Court directed a fresh account to be drawn up of the liabilities of the defendant to the plaintiffs, and a decree prepared according to the provisions of s. 88 of the Transfer of Property Act ; the amount mentioned in the decree to be paid within three months from the date of the signing of the decree, failing which the plaintiffs will be at liberty to sell the mortgaged properties in the manner specified in the Subordinate Judge's decree.

C. W. Arathoon, for the appellant, contended that upon the evidence the Subordinate Judge was right in crediting the Raja with the two sums of Rs. 8,700 and Rs. 3,300, and that the Courts ought to have found that he was not liable for so much of the Rs. 35,000 and Rs. 20,000 as was not proved to have come to his hands. There was no stipulation as to commission in the mortgage deed, and there was no sufficient allegation in the plaint or any sufficient evidence of a collateral agreement to that effect. Those sums should not have been debited to the mortgagor in the account : see *Mainland* v. *Upjohn* (1) ; *Biggs* v. *Hoddinott*. (2)

[*Cohen* referred to *Rice* v. *Noakes*. (3)]

He referred to the Indian Contract Act, s. 16, as amended by the Act VI. of 1899, s. 2, and contended that the evidence shewed that at the time of the transaction the position of the parties, and the distress of the appellant, were such that the lender was able "to dominate the will" of the borrower. Also to *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (4), and contended that the present case was within that decision. Also to the Contract Code, s. 74, as amended by Act VI. of 1899, s. 4, and contended that the High Court, having held that the stipulation to pay a higher rate of interest in case of failure to pay interest for one year was a penalty, should not have allowed compensation at the same rate as that mentioned in the agreement by way of penalty.

(1) (1889) 41 Ch. D. 126.
(2) [1898] 2 Ch. 307.
(3) [1900] 1 Ch. 213 ; on appeal [1902] A. C. 24, 32.
(4) L. R. 33 Ind. Ap. 118.

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To do so was to refuse relief from the penalty. Further, the contract rates of interest should not have been allowed from the date of institution of the suit.

Cohen, *K.C.*, and *Phillips*, for the respondents and cross appellants, contended that s. 16 of the Contract Act did not apply. There was no evidence of undue influence, and no allegation to that effect, and it could not be inferred from the urgent need of the Rajah for money at the date of the mortgage. The provisions of the contracts in the two bonds were all reasonable and valid, and no ground was shewn for not giving full effect to them according to their terms. The parties intended that full interest, both compound interest and interest at the higher rates until realization, ought to be allowed on both the bonds. The High Court, it was contended, was wrong in restricting the increased rate of interest stipulated in the first bond to the period from the date of the second bond. They referred to the Contract Act, s. 74; The Transfer of Property Act, ss. 86 and 88; *Rameswar Koer* v. *Syed Nawab Mehdi Hossein Khan* (1); *Mackintosh* v. *Crow* (2); *Abdul Gani* v. *Nandlal* (3); *Prayag Kapri* v. *Shyam Lal* (4); Seton on Decrees, p. 1911; C. C. P. (1882) s. 209; *Amolak Ram* v. *Lachmi Narain* (5); *Bakar Sajjad* v. *Udit Narain Singh* (6); *Maharajah of Bharatpur* v. *Ram Kanno Dei.* (7)

Arathoon replied, citing *Kalachand Kyal* v. *Shibchunder Roy.* (8)

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The judgment of their Lordships was delivered by

LORD DAVEY. This case comes before their Lordships on appeal and cross appeal. The questions between the parties arose in taking the accounts between mortgagor and mortgagee. The appellant in the principal appeal is the widow and representative of Raja Rameswar Pershad Narayan Singh, the mortgagor and original defendant. The mortgagees, who were

(1) (1898) L. R. 25 Ind. Ap. 179; S. C. I. L. R. 26 Calc. 39.
(2) (1883) I. L. R. 9 Calc. 689.
(3) (1902) I. L. R. 30 Calc. 15.
(4) (1903) I. L. R. 31 Calc. 138.
(5) (1896) I. L. R. 19 Allah. 174, 176; S. C. (1905) 28 Allah. 223.
(6) (1899) I. L. R. 21 Allah. F. B. 361.
(7) (1900) L. R. 28 Ind. Ap. 35, 43.
(8) (1892) I. L. R. 19 Calc. 392.

plaintiffs in the suit, were the respondents to the principal appeal, and the appellants in the cross appeal.

The object of the suit was to enforce payment, by sale of the mortgaged properties, of sums of money owing on two mortgage bonds dated respectively June 19, 1888, and June 15, 1891. By the earlier bond the principal sum secured was Rs. 4,35,000, with interest at the rate of 14 annas per cent. per mensem, equivalent to 10½ per cent. per annum, and by the first condition of the bond it was agreed that the interest should be paid every six months, and in case of default the mortgagee should pay interest on interest, at the rate of R. 1-8 annas per cent. per mensem (equivalent to 18 per cent. per annum); and if the amount of interest be not paid within the year, interest on the aforesaid amount of the loan should run at the rate of R. 1 per cent. per mensem (equivalent to 12 per cent. per annum), from the date of the execution of the bond till the day of payment.

The principal sum secured by the bond of June 15, 1891, was Rs. 1,65,000, made up as follows: (1.) Amount due for interest under the first bond; (2.) Amount due for principal and interest under an intermediate bond dated February 22, 1889; and (3.) A further sum stated to have been then advanced. The stipulations as to the interest and compound interest are similar to those in the first bond, except that the rate of interest on the principal money was 12 annas per cent. per mensem instead of 14 annas.

Various points were raised by the mortgagor in his statement of defence, and in all sixteen issues were settled. The only points, however, discussed in the argument of the principal appeal before their Lordships were (1.) that both bonds were obtained from the mortgagor by undue influence within the meaning of s. 16 of the Indian Contract Act, 1872, as amended by Act VI. of 1899, s. 2; (2.) that a sum of Rs. 8,700 retained by the mortgagees out of the principal sum secured by the first mortgage by way of commission, and a similar sum of Rs. 3,300 retained out of the principal sum secured by the second mortgage ought not to be allowed to them; (3.) that the additional interest charged in both bonds, both by increase of the general rate and by the increased rate of the compound interest on default of

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payment of interest, was a penalty within the meaning of s. 74 of the Indian Contract Act, as amended by Act VI. of 1899, s. 4, and ought not to be allowed.

There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned counsel for the appellant argued that the mortgagees were thereby placed in a position "to dominate the will" of the mortgagor, and cited a recent decision of this Board—*Dhanipal Das* v. *Raja Maneshar Bakhsh Singh.* (1) In that case, however, the borrower was "a disqualified proprietor" under the Oudh Land Revenue Act, 1876, and his estate was under the management of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability, and the position of the parties was such that the lender was "in a position to dominate his will." There is nothing of that kind in the present case, and their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position.

It is not denied that the two sums of Rs. 8,700 and Rs. 3,300 were in fact retained by the mortgagees for commission, and the substantial defence was that it was done with the mortgagor's knowledge and consent at the respective times of the transaction. In the Courts below these sums were treated as items in two larger sums which it was alleged had not come to the Raja's hands and ought not therefore to be debited to him. The other items in these larger sums appear to have found their way in part to the hands of one Jai Krishen, a relative of the mortgagees, and an old gomashta, Kuerji Dichhit, either directly or as purchase-moneys for goods sold by them to the Raja, and as to the rest to the hands of the mortgagor's own servants. The Subordinate Judge held that the plaintiffs (the mortgagees) had no hand in these transactions, and that this extortion could not be laid at their door. And indeed it is hard to see how the mortgagees could be charged with money paid in the nature of douceurs or bribes to persons who (it was said) had great

(1) L. R. 33 Ind. Ap. 118.

influence over them and had to be propitiated. This part of the case was not pressed upon their Lordships' attention. But the Subordinate Judge held that the mortgagor ought to be credited with the two sums of Rs. 8,700 and Rs. 3,300 retained by the mortgagees as commission, but not with the interest on the Rs. 8,700 which was allowed without objection on the settlement prior to the execution of the second bond.

The learned judges of the High Court dealt with the whole of the deductions from the principal moneys together. They say : "There cannot, we think, be the slightest doubt on the evidence that the defendant understood perfectly well that the two sums of Rs. 35,000 and Rs. 20,000 out of the considerations of the two bonds were kept back in payment of the carriage and horses, the kinkhab cloth, and commission to the plaintiffs, and however reluctant to agree to this being done, yet he did agree to these sums being retained and disposed of in these ways, and did consciously and knowingly admit the receipt of the full consideration of the two bonds."

And after a very full and careful analysis of the evidence, in the course of which they justly observed that the evidence on the defendant's (the mortgagor's) side was most significant, they summed up their conclusion thus : "There are, therefore, we think, no grounds upon which he can now, years after the bonds were executed, be allowed to turn round and say he did not receive the full amounts of the consideration for these bonds."

Their Lordships have examined the evidence for themselves, but do not find it necessary to say more than that they agree with the statement of the learned judges as to the effect of it. Not without some reluctance they are constrained also to agree with the conclusion of the High Court on this point.

The "explanation" to s. 74 of the Contract Act as amended says that "a stipulation for increased interest from the date of default may be a stipulation by way of penalty." The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective, and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the

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mortgagor. Their Lordships accept that view of the statute, and it is unnecessary to discuss under what circumstances increased interest running only from default should or should not be considered a stipulation by way of penalty. The principal appellant (the mortgagor) argues that the increased interest ought therefore to be disallowed altogether. But this is not what the statute prescribes. It directs that the party complaining of the breach shall receive from the party who has broken the contract reasonable compensation, not exceeding the amount of the penalty stipulated for. The High Court (agreeing so far with the Subordinate Judge) has given compensation at the same rate as the mortgagor agreed to pay as increased interest, but (differing in this respect from the Subordinate Judge) has not allowed such interest to run from the respective dates of the bonds. The learned judges observe that at the date of the execution of the second bond there was a settlement of accounts as regards the interest due on the first bond, and simple interest only was then calculated, and the amount was included in the principal of the second bond. They treat this as a waiver of the compound interest, and any claim for increased interest to that date, and they therefore hold that the increased interest by way of compensation on the first bond should run only from the date of execution of the second bond, and that on the second bond should run only from the date of default of that bond. Their Lordships see no reason to differ from the concurrent judgment of the Courts below, so far as concerns the rate of the increased interest payable by way of compensation, and they think the High Court has come to a right decision as to the dates from which such increased interest should run.

Their Lordships also agree with the High Court on the question as to the higher rate at which compound interest was to run. Compound interest is in itself prefectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. As, however, the mortgagees have already been at least sufficiently compensated for the default by the increased rate of interest allowed them, their Lordships think that the High Court has

taken a reasonable course in allowing compound interest at the same rate only as that at which simple interest was stipulated for on the bond.

The decree passed by the High Court is dated June 13, and was signed on June 17, 1901. It is in the form provided by ss. 86 and 88 of the Transfer of Property Act, 1882, the day fixed for redemption being September 17, 1901, and in default of payment of the aggregate amount found to be due on that day into Court it provides for payment of simple interest on such aggregate amount at the rate of 6 per cent. per annum from September 17, 1901, until realization.

The point argued on the cross appeal was that interest ought to have been allowed at the rate stipulated in the bonds with (it is assumed) compound interest from the fixed day until actual realization. The learned counsel referred to the provisions contained in ss. 86 and 88 of the Transfer of Property Act, and relied in support of his argument on the language used by Lord Hobhouse in delivering the judgment of this Board in the case of *Rameswar Koer* v. *Mehdi Hossein Khan*. (1)

The decree is in accordance with the directions contained in Rules of Court made by the Calcutta High Court under the power for that purpose conferred on the Court by s. 104 of the Transfer of Property Act, as well as in rules of an earlier date, and with the uniform practice of that Court. This appears from an instructive note by Mr. Belchambers, the registrar of the Court, appended to the report of *Achalabala Bose* v. *Surendra Nath Dey*. (2) The same practice has been followed by the Madras High Court : *Subbaraya* v. *Ponnusami Nadar*. (3)

Their Lordships have carefully examined the case cited by Mr. Cohen—*Rameswar Koer* v. *Mehdi Hossein Khan* (1)—and are satisfied that the question which is now before them was not before the Board or present to the mind of Lord Hobhouse. It was an appeal by the mortgagor from a decree of the High Court of Calcutta, which had directed payment of interest at 12 per cent. per annum (being the mortgage rate) from the date of the institution of the suit to the date fixed by

(1) L. R. 25 Ind. Ap. 179, 182. (2) (1897) I. L. R. 24 Calc. 766.
(3) (1897) I. L. R. 21 Madr. 364.

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the Subordinate Judge for the repayment of principal and interest, but contained no direction for payment of interest after that date. And the point argued was that interest from the date of the suit should be at 4 per cent. only, as had been directed by the Subordinate Judge, instead of 12 per cent. allowed by the High Court. The mortgagee did not appeal. The passage in the judgment which is relied on is as follows: "The High Court founded their order on ss. 86 and 88 of the Transfer of Property Act which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization."

The expression "up to the date of realization" may have been used per incuriam, or it may have meant "the day fixed for realization," as in fact it seems to have been understood by the reporter of the case in the Indian Law Reports as expressed in his marginal note. (1) Their Lordships cannot have intended to say that ss. 86 and 88 of the Transfer of Property Act indicate that interest at the mortgage rate should be paid up to the time of actual payment of the mortgage money to the mortgagee. These sections contain no direction for interest beyond the day to be fixed by the Court up to which the account is directed to be taken, and in fact the whole difficulty on which there has been so much controversy has arisen from that circumstance. It is enough to say that the question as to the rate of interest (if any) to be allowed after the fixed day until actual realization was not before the Board, and the case is not an authority on that question.

In the subsequent case of the *Maharajah of Bharatpur* v. *Ram Kanno Dei* (2) the appeal was on the construction of an obscurely worded decree, the decision of which was considered to turn on the question whether, according to the true construction of s. 88, any interest could be allowed by the Court after the fixed day. Their Lordships held that s. 88 did not preclude the payment of such interest, but it was not necessary for them to decide at what rate such interest should be allowed. It may, however, be observed that the rate allowed by the Court below

(1) I. L. R. 26 Calc. 39.

(2) L. R. 28 Ind. Ap. 35.

(which their Lordships held on the construction of the decree to be applicable to the period after the fixed day) was 6 per cent. per annum only, and not the mortgage rate, and the decision of their Lordships was based mainly on "the universality of the long-established practice, its continuance for years after the Transfer Act passed, the manifest justice of it," and "the lack of any apparent reason for upsetting it."

In the present case their Lordships have no hesitation in expressing their concurrence with the High Court of Calcutta, not only in allowing interest after the fixed day, but also in allowing interest at the Court rate and not at the mortgage rate. They think that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest, and costs due on a fixed day, and that after the expiration of that day, if the property should not be redeemed, the matter should pass from the domain of contract to that of judgment, and the rights of the mortgagee should thenceforth depend, not on the contents of his bond, but on the directions in the decree. It will be observed that according to the practice explained by the registrar, which has been followed in this case, the interest is allowed on the aggregate sum, and not merely on the principal money, and this is right if the mortgagee is treated as a decree holder or judgment creditor, but would be wrong if the right to the interest depended on the terms of the mortgage bond. After the decision of this Board last cited it is immaterial to inquire into the source of the power in the Court to allow such interest. The words of s. 209 of the Civil Procedure Code are large enough to include the case of a sum of money payable to the plaintiff out of a fund, and it may be that the Legislature considered that the power of the Court to allow interest after the fixed day was sufficiently provided or preserved by that section, the two Acts being co-temporary. Or it may be said that the provisions of the Transfer of Property Act are not exhaustive and were not intended to overrule the established practice. The directions for payment to the parties contained in s. 88 cannot be read literally, because s. 94 contemplates a final adjustment and provides for payment of subsequent costs, and there is

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nothing in the Act which precludes the subsequent interest also being taken into account as decided in the *Maharajah of Bharatpur's Case.* (1) From the form in which that case came before the Board it was unnecessary to decide at what rate subsequent interest should be allowed, but the reasons given in the judgment in that case appear to their Lordships to be equally cogent for the interest being at the Court rate.

Their Lordships will therefore humbly advise His Majesty that the appeal and cross appeal be both dismissed. It is impossible, in a case like this, to adjust the payment of costs with mathematical accuracy, but as the greater part of the expenses have been incurred on the principal appeal, their Lordships think that justice will be done by directing the principal appellant to pay to the cross appellants one-half of their costs of the consolidated appeals, and making no further order as to costs.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Morgan, Price & Mewburn.*

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Nov. 7; *Dec.* 18.

JONNALAGADDA VENKAMMA AND ANOTHER . . . . . } APPELLANTS;

AND

JONNALAGADDA SUBRAHMANIAM AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Hindu Adoption—Consent of Sapindas obtained by false Representation.

Held, that a widow who fails to prove her husband's authority to adopt cannot support its validity by consents given by her husband's sapindas on her representation that by so doing they were ratifying the husband's authority.

APPEAL from a decree of the High Court (February 18, 1903), reversing a decree of the District Court of Kistna (April 25, 1901).

The suit, which was dismissed by the first Court and decreed

(1) L. R. 28 Ind. Ap. 35.

**Present* : LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

by the High Court, was brought by the first respondent against the appellants and the second respondent for a declaration that the adoption of the second appellant by the first appellant was and is invalid.

The case made in the plaint was that the adoption had not been authorized by the deceased, and—in paragraphs 6 and 7—that no gnatis other than the second respondent had been asked to give permission to the widow to make the adoption, and that his permission had been actuated by corrupt motives.

The written statements of defence denied the corrupt motives alleged against the third defendant (i. e., the second respondents). That filed by the widow on behalf of herself and the second defendant stated that the plaintiff and other gnatis denied her husband's permission, that the witnesses thereto were dead, that she obtained permission anew from the third defendant and other gnatis, and on April 19, 1900, obtained from the third defendant a deed of authority for adoption; and that, according to the said permission, she had on April 20, 1900, adopted the minor second appellant of her free-will and according to law, in order to perpetuate the line of her late husband Ramayya.

The District Judge found to the effect that neither the corrupt motives attributed to the second respondent nor the express power to adopt, alleged to have been given by the deceased Ramayya, had been proved; and, further, that it would have been useless for the widow to seek the authority of the plaintiff for the adoption of the second appellant, and that in the circumstances the authority of the senior reversioner was sufficient authority for the widow to make the adoption. As to "the deed of authority to adopt" of April 19, 1900, the District Judge held that it should be construed as an independent permission to adopt whether the husband had given permission or not; adding, "Except as an independent authority to adopt, the document seems to me to be meaningless. Venkamma wanted to put her right to adopt beyond question, and asked for and obtained the permission of a near gnati in addition to the authority of her husband which she asserted existed. It would not, in my opinion, be a reasonable construction to put on the document to construe it to mean that, because the husband gave

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permission, the third defendant gave permission. I think it should be construed to be an independent permission to adopt, whether the husband gave permission or not."

The High Court concurred with the District Court in holding that the alleged authority to adopt from the husband was not proved, and that it was not established that the assent of the senior reversioner was procured for a pecuniary consideration. And although they differed from the District Judge on the construction of the deed of April 19, 1900, they held, nevertheless, that the assent of the senior reversioner if otherwise sufficient was not invalidated by the widow's allegation of her husband's authority. But they were of opinion that the seniority of the assenting reversioner was immaterial, and that his assent was insufficient for the reason that his brother's, i.e., the plaintiff's, assent was not also sought. Also they put out of account the alleged assent of the remoter sapindas.

Kenworthy Brown, for the appellants, contended that the adoption in this case was duly authorized and was valid. The widow was not, under the circumstances, bound to apply to the first respondent for his consent to the adoption. He also contended that the District Court's construction of the deed of April 19, 1900, was correct; and that the High Court had failed to give due weight to the assent of the remoter kindred of the deceased. He referred to *Collector of Madura* v. *Srimatu Muttu Vijaya Ragunada Sethupathi* (1), where it was held that a widow's adoption is valid if with the assent of the majority of her husband's surviving kindred; *Collector of Madura* v. *Muttu Ramalinga Sethupathi* (2), which affirmed that decision and dealt with the question as to what constituted sufficient consent, having regard to the circumstances in which the widow is placed; and see also *Sri Raghunadha* v. *Sri Brozo Kishoro* (3); *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* (4); *Venkatalaksmanna* v. *Narasayya*. (5)

The respondents did not appear.

(1) (1864) 2 Madr. H. C. R. 206, 221.
(2) (1868) 12 Moo. Ind. Ap. 397, 442, 444.
(3) (1876) L. R. 3 Ind. Ap. 154, 192, 193.
(4) (1880) L. R. 7 Ind. Ap. 173.
(5) (1885) I. L. R. 8 Madr. 545, 548.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The question in this appeal is of the validity of the adoption of the second appellant by the first appellant. That a form of adoption was gone through may be assumed; but the first respondent has obtained the decree appealed against, which declares the nullity of that adoption, on the ground that the first appellant, who is the widow, had not the requisite consent of her deceased husband or of his kinsmen.

The suit was brought in the District Court of Kistna, and in that Court was dismissed with costs. This decree was reversed with costs by the High Court of Madras on February 18, 1903.

The deceased Ramayya was a Brahmin and was separate in estate from his kinsmen. He died without issue in 1881, and his widow, the first appellant, succeeded to his property. The respondents, who are cousins of the deceased, are the nearest reversionary heirs to the estate. They are divided brothers, the second respondent being the elder, and they are the nearest kinsmen of the deceased. The second respondent, before the alleged adoption, executed a deed purporting to authorize it, and certain remoter kinsmen also signed this deed. The first respondent was not asked for his consent, and never gave it. The alleged adoption took place on April 20, 1900.

One of the most important facts in the case is that the first appellant, the widow, at the time of the adoption and in her defence to this action asserted that her husband had before his death given her, orally, permission to take a boy in adoption. Both Courts have held that this has not been established in evidence. It is only as a second and corroborative authority that the first appellant obtained the deed of consent which has been mentioned. This failure of the appellants to prove the husband's authority enters deeply into the question about the kinsmen's consent, for it cannot be disputed that the first appellant, in obtaining such consents as she did, represented herself to have received her husband's authority. Accordingly the respondents rely not merely on the absence of the consent of one of the two nearest kinsmen, but on the consents actually obtained having been given, not in the exercise of an independent judgment on the expediency of the proposed adoption, but

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rather as the ratification of what must now be taken to be the non-existent authority of the deceased husband. This is the view taken in the judgment appealed against, and in their Lordships' opinion it is sound.

It is unnecessary to re-state the law as to the persons whose authority is required for adoption, for the appellants' case fails in the quality of the consents actually obtained. But, in their Lordships' judgment, the appellants have failed to justify the widow in omitting to ask for the authority of a person holding so important a position in the family as did the first respondent. She defends herself by saying that she knew he would refuse; but she is not entitled to say so, and to consult him was essential to her obtaining the mind of the kinsmen on this family question. In truth, however, her conduct in this particular goes to prove, along with the other facts, that the mind of the kinsmen was not what she was in search of. The consent which she asked and obtained was ratification of the authority already given by the husband, for this is expressty stated in the written consents on which the appellants found. It is impossible for the appellants now to set up this as an independent ground of defence. Even if the first respondent had been consulted and had consented on the same footing as the others, there is absent from this adoption the independent approval of the natural advisers of the widow. But the failure to consult one of the two nearest kinsmen has not been justified.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The respondents not having appeared, there will be no order as to costs.

Solicitor for appellants : *Douglas Grant.*

RANI CHANDRA KUNWAR . . . . . DEFENDANT; J. C.*

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CHAUDHRI NARPAT SINGH AND OTHERS. . PLAINTIFFS. *Nov.* 13, 14; *Dec.* 14.

RANI CHANDRA KUNWAR . . . . . DEFENDANT;

AND

RAJAH MAKUND SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

CONSOLIDATED APPEALS.

Evidence—Onus probandi—Plaintiff to prove that his former Admissions were Untrue.

Where the defendant in an action of ejectment denied the plaintiff's title by inheritance and pleaded that, although the natural son of the last holder, the plaintiff had been adopted by a third party :—

Held, that on proof of admissions contained in a deed of gift and a power of attorney, to which the plaintiff, but not the defendant, was a party, that the plaintiff had described himself as such adopted son, the adoption must be taken to be established in the absence of satisfactory proof by the plaintiff that the admissions were untrue in fact.

CONSOLIDATED appeals from two decrees of the High Court (March 17, 1902), reversing two decrees of the Subordinate Judge of Shahjehanpore (December 12, 1900).

Rajah Sher Singh was the original owner of all the villages in suit. The respondents alleged that on his death his widow, Rani Chauhan Kunwar, succeeded to a Hindu widow's estate of inheritance ; while the appellant's case was that Rajah Sher Singh had made a gift during his lifetime to his wife. In the years 1854 and 1860 Rani Chauhan Kunwar made a gift of the said villages to her daughter, Iiwan Kunwar, since deceased, who in the year 1865 transferred all the said villages to her son Rajah Hemanchal Sah, who predeceased her and was succeeded by his widow the appellant.

Rajah Makund Singh (from whom the other respondents derived title) claimed as next heir to Sher Singh, and that the succession

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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opened on the death of Iiwan Kunwar (who had succeeded to a daughter's estate) to his father Partab Singh, who was the son of Sher Singh's deceased daughter Pran Kunwar. The defence was that Makund Singh was not the son of Partab, and that Partab was not the son of Pran Kunwar.

The Subordinate Judge found that Partab Singh was the son of Pran Kunwar, but that Makund Singh was not Partab's son, as he had become the adopted son of Rajah Kishun Singh. The consequence in law of this finding was that Partab Singh's heir was his widow, and not the plaintiff, and accordingly both suits were dismissed.

The High Court ruled that the question of adoption was not properly in issue, and that, if it were, the adoption was not proved.

The Court said: "The evidence satisfies us beyond any reasonable doubt, and we find that Rajah Makund Singh was the natural son of Rajah Partab Singh, and that he was never in the legal sense of the term adopted by his uncle Rajah Kishun Singh. We also find that Rajah Partab Singh was the son of Rani Pran Kunwar. We may add that the reflections cast by the learned Subordinate Judge upon the character of the plaintiff's witnesses were, in our opinion, wholly undeserved. As we have pointed out, the evidence of a number of these witnesses was obtained by commission, and therefore we have had as good opportunity as had the learned Subordinate Judge of forming an estimate of its value and probative effect. As we have pointed out, there was no evidence worthy of the name to controvert it. We unhesitatingly, therefore, find that Rajah Makund Singh is the son and heir of Rajah Partab Singh. The question of adoption was never properly in issue between the parties, but assuming that it was, we hold that the defendant has wholly failed to satisfy the onus which lay upon her of proving the adoption. Accordingly we allow the appeal, set aside the decree of the lower Court, and, inasmuch as only one issue has been tried, remand the case to the Court below under the provisions of s. 562 of the Code of Civil Procedure, and direct the Court to re-admit the suit under its original number in the register and proceed to determine it on the merits."

De Gruyther, for the appellant, contended that, although the word "adoption" was not used in the issue relating to the sonship of Makund Singh, both parties knew that the decision turned upon that question, and both directed their evidence to this point, and there was no surprise. Two powers of attorney executed in 1887 and 1891 by Makund and Partab were proved and described the former as adopted son of Rajah Kishun Singh, and so also did a deed of gift proved to have been executed by Makund in 1892. It was admitted that on the death of Kishun Singh he was succeeded by Makund to the exclusion of Partab. No sufficient explanation was given of these statements. It was contended that the onus lay on the respondents to prove that they were untrue in fact, and that otherwise he was bound by the admissions. He referred to the Civil Procedure Code, ss. 138 and 147; *Katchekaleyana Rungappa* v. *Kachivijaya* (1); *Mussumat Mitna* v. *Syud Fuzlrub*. (2)

Ross, for the respondents, contended that the High Court's view of the evidence was correct, and that it was established that Rajah Makund Singh was the son of Partab Singh, and that he was entitled to succeed as heir, inasmuch as the alleged adoption had not been satisfactorily tried or proved. If it had been intended to raise the issue of adoption, it should have been raised in the appellant's written statement. The order of remand under s. 562 of the Code had been properly made; and a specific issue on the question of adoption should now be framed and included in the remand. He referred to ss. 562 and 566 of the Code.

De Gruyther replied on the question as to remand.

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The judgment of their Lordships was delivered by

LORD ATKINSON. The two suits out of which these consolidated appeals arise were brought to recover from the appellant possession of certain zemindari property, consisting of villages and gardens situate in the district of Budaun.

In one of these suits (No. 129 of 1899) Rajah Makund Singh was the sole plaintiff, while in the second (No. 128 of 1899) certain persons to whom it was alleged he had purported

(1) (1869) 12 Moo. Ind. Ap. 495. (2) (1870) 13 Moo. Ind. Ap. 573.

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to sell and convey the property sought to be recovered in that suit were the plaintiffs, and Makund Singh was joined as a pro forma defendant. The evidence was taken in the second of these suits, but as the questions arising in both suits were practically identical, they were tried together, and the evidence taken in one was, by arrangement between the parties, treated as having been taken in both and used for the purposes of both.

The property in dispute formerly belonged to Rajah Sher Singh, a rajah of the State of Jaipur, who died many years ago, and in the events which have happened came by descent to Rajah Partab Singh, his grandson, who died on July 26, 1898, leaving his widow him surviving. She is still alive. Rajah Partab Singh was the youngest of three brothers. Both his elder brothers predeceased him. The eldest, Kishun Singh, the survivor of the two, died in 1873. At that date Partab Singh was forty-eight years old. The plaintiff Makund Singh claimed to be the lawfully begotten son of Partab Singh, and to have inherited from his father the property sought to be recovered in the two actions. This was the sole title on which he relied. His age was disputed, the defendants asserting that he was ten years old in 1873, and the plaintiffs that he was then thirteen years of age. Several defences were filed in both suits, in which it was alleged (amongst other things) that Partab Singh was not the father of Makund Singh. Upon these pleadings certain issues were framed, with the first of which their Lordships have alone to deal, since it is that on which the decisions appealed from were alone rested. This first issue ran as follows: "Is Rajah Partab Singh a son of Pran Kunwar, and is Rajah Makund Singh a son of Rajah Partab Singh?"

It was found, and is not now disputed, that Partab Singh was the son of Pran Kunwar, the eldest daughter of Rajah Sher Singh. It is upon the second branch of the issue that the controversy in the case arises. The judges of the High Court have found that Partab Singh was the natural father of Makund Singh, and their Lordships see no reason to disturb their finding on that point. Under the Hindu law, however, a man who has

been adopted ceases by virtue of that adoption to be regarded as the son of his natural father, and becomes for the purpose of inheritance or succession the son of his adoptive father. And accordingly in the course of the litigation in the Court of the Subordinate Judge the defendant at an early stage, without protest or objection on the part of the plaintiffs, made the case that Makund Singh had been adopted by Kishun Singh. Deeds under the hands of Makund Singh and his father Partab Singh containing express statements to that effect were given in evidence by the defendant. Questions directed more or less pointedly to the matter were addressed to the plaintiffs' witnesses. Evidence was given by and on behalf of Makund Singh to explain away the admissions contained in those instruments and to account, if possible, for the fact that on the death of Kishun Singh Makund Singh had been put forward as his successor. No suggestion was made on behalf of the plaintiffs that they were taken by surprise. No application was made that the pleadings should be amended, a new issue framed, or the hearing adjourned. In order that the plaintiffs should succeed in these cases it was essential that it should be found in their favour (1.) that Makund Singh was the natural son of Partab Singh, and (2.) that he had not been adopted by Kishun Singh. From a passage in the judgment of the Subordinate Judge it is quite clear that he considered that both these questions were before him for decision. His words were: "The plaintiffs must then produce unimpeachable evidence to prove their allegation that Rajah Makund Singh is a son of Rajah Partab Singh, and, if so, he had not ceased to be so by having been adopted by Rajah Kishun Singh."

He does not appear, however, to have come to a definite decision on either of these points, but merely to have arrived at the conclusion that the evidence before him did not amount to satisfactory proof that Makund Singh was the natural son of Partab Singh. The judges of the High Court, on the other hand, found, as has been already stated, that Makund Singh was the natural son of Partab Singh, and although they considered that "the question of adoption was never properly in issue between the parties," yet, on the assumption that it was,

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held: "That the defendant had wholly failed to satisfy the onus which lay upon her of proving the adoption."

It is to be regretted that a definite issue was not framed upon this point, and the matter thus put beyond all controversy. But that course never seems to have been suggested at any stage of the proceedings by any of the persons concerned.

The suits were commenced on September 23, 1899. On November 30, 1899, and December 1, 1899, respectively the issues were framed. The cases came on for hearing on November 30, 1900. The arguments were concluded on December 1, 1900; and judgment was delivered and decrees pronounced by the Subordinate Judge on December 12. Evidence was taken by commission and the witnesses examined by interrogatories at Alwar on January 29, 1900, at Agra on November 5, 1900, and the plaintiff Makund Singh at Delhi on October 16, 1900. Other witnesses were examined in the Court of the Subordinate Judge at the hearing.

On November 30, 1899, there was filed in Court on behalf of the defendant a list of documents, one of which is described as a copy of a deed of gift dated June 25, 1892, duly executed by Partab Singh and Makund Singh, in which the latter is stated to be the "adopted son of Raja Kishun Singh, rais of Patan, in the Sewai Jaipur State." And on May 14, 1900, a second list of documents was in like manner filed on behalf of the defendant. One of the documents in this second list is described as a copy of a power of attorney, dated June 10, 1891, duly executed by Partab Singh and Makund Singh, in which the latter is similarly described, and in the body of the deed specifically stated to be the ruler of Patan. The object for which the first document was to be given in evidence was stated to be: "To prove that Makund Singh is not the son of Partab Singh, and that he did not mention himself in this document to be the son of Partab Singh."

And the object for which the second deed was proposed to be given in evidence was in like manner stated to be "to show that Raja Makund Singh is the adopted son of Raja Kishun Singh, and that in this mukhtarnama (power of attorney) Raja Makund Singh has described himself as the adopted son of Kishun Singh."

There can be no ground, therefore, for the suggestion that the plaintiffs were not fully informed that this question of adoption would be raised, and that one, if not both, of these documents would be relied upon to prove the admissions of Makund Singh upon this question of adoption contained in them. This, indeed, was the only purpose for which they could have been given in evidence in these suits. One witness examined on behalf of the plaintiffs, Gur Dhan Singhji, was on January 29, 1900, pointedly cross-examined as to this deed of gift.

On October 16, 1900, many months afterwards, Makund Singh was himself examined by interrogatories. In the seventh interrogatory he is asked, "What relation do you bear to Rajah Kishun Singh, and how did you receive his property ?"

Answer : " Rajah Kishun Singh was my taya (father's elder brother). On his death he left no descendant, and his property devolved on my father. As my father was an old man, he of his own accord installed me on the gaddi of the riyasat."

And on cross-examination he deposed : " Rajah Kishun Singh died in 30 Sambat. The title of Rajah held by him was received by me. This title has not been given by anyone. It is a hereditary one. After (the death of) Rajah Kishun Singh, I was installed on the gaddi with the consent of my father. Before this Jamna Lal, pleader, examined me by means of commission. I stated in that deposition that after the death of Kishun Singh I received his estate by right of inheritance, i.e., it came to my family. By this statement I meant that my father received it, and that I received it with his consent. I do not remember now whether I stated in that deposition that Rajah Partab Singh installed me."

To the pleader for the plaintiff : " I was not asked plainly whether that property was received by Partab Singh or by me."

On December 5, 1900, after the arguments in the case had concluded and before judgment was delivered, the pleaders of the plaintiffs made an application to the Court of the Subordinate Judge that the reason given in the argument why Makund Singh described himself in the deed of gift and power of attorney as the adopted son of Kishun Singh should be reduced into writing and recorded, that reason being that "the Patan Raj was in the name

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of Rajah Kishun Singh, that Rajah Makund Singh was mentioned as his adopted son, so that he might be installed on the raj gaddi, and that at the time of installation, a nazrana (present) is paid to the Jaipur Raj as a token of mourning. After the death of Kishun Singh, Makund Singh was installed on the gaddi to make a saving in the payment of the nazrana; for once it would have to be paid at the time of installation of Rajah Partab Singh after the death of Rajah Kishun Singh, and again at the time of installation of Makund Singh after the death of Rajah Partab Singh. As Makund Singh was proclaimed an adopted son at the time of installation, he was written as such in the documents."

This was accordingly done, but no proof whatever was given that the custom of giving nazrana on the occasion of installations to a Raj Gaddi prevailed in the State of Jaipur, or that a nazrana had, in fact, been paid on the occasion of Makund Singh's installation. Moreover, this explanation put forward at the last moment was not alluded to, directly or indirectly, by any of the witnesses examined in the case, and is quite inconsistent with the evidence of Makund Singh himself above set forth. It is, in addition, the second explanation, not the first, and is in direct conflict with that which preceded it. The first explanation is deposed to by more than one of the witnesses examined on behalf of the plaintiffs, but is set forth more fully in the evidence of Pandit Ram Kunwar, who was examined at Agra on November 5, 1900, than in that of any others. In answer to the seventh interrogatory addressed to him, he deposed: "Maharajah Partab Singh had a right of inheritance after the death of Rajah Kishun Singh. But he subsequently thought that as he was advanced in years he might perhaps also die. This led him to give the whole of the property to Makund Singh. Makund Singh was the managing member of the families of Rajah Kishun Singh and Partab Singh. There was no other managing member. It was for this reason that the property was given to him."

As at the date of Kishun Singh's death Partab Singh was only forty-eight years of age and Makund Singh at most thirteen, and possibly only ten, years of age, this explanation was not only incredible, but absurd. It was therefore not unnaturally deemed advisable to suggest another. And accordingly the

economical reason—the desire to escape a double tax, the giving of nazrana twice over—was at the last moment put forward in argument and subsequently solemnly recorded.

On the materials before their Lordships the broad and undisputed facts of these cases appear to be :

(1.) That the plaintiff Makund Singh more than once under his hand and seal stated that he was the adopted son of Kishun Singh, which statement was in effect an admission that he had no title to the lands he sought to recover in these actions.

(2.) That at the death of Kishun Singh Makund Singh was treated as the former's adopted son, and in that character, and by that right, installed in the Raj Gaddi.

(3.) That according to the evidence of three at least of the plaintiffs' witnesses, on the death of Kishun Singh, Makund Singh entered into the possession and enjoyment of the former's property.

(4.) That two different and inconsistent explanations have been put forward by the plaintiffs to account for the admission contained in the deeds, as well as for the action taken by the parties concerned after the death of Kishun Singh, one of which explanations is absurd and the other, in its most important parts, unproven.

The learned Chief Justice in his judgment points out that the burden of proving that the adoption relied upon took place rests on the defendant. That is undoubtedly so, but it is difficult to conceive how she could, as against Makund Singh—prima facie, at all events—discharge that burden more effectually than by proving his solemn statement under hand and seal that it did take place. The proof this admission shifts the burden, because, as against the party making it, as Parke B. says in *Slatterie* v. *Pooley* (1), " What a party himself admits to be true may reasonably be presumed to be so." No doubt, in a case such as this, where the defendant is not a party to the deeds, and there is therefore no estoppel, the party making the admission may give evidence to rebut this presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be established. The law upon the point is clear. In *Heane* v.

(1) (1840) 6 M. & W. 664, at p. 669.

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Rogers (1) Bayley J., in delivering the judgment of the Court, lays it down that: "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them unless another person has been induced by them to alter his condition. In such a case the party is estopped from disputing their truth as against that person (and those claiming under him) and that transaction, but as to third parties he is not bound."

In *Newton* v. *Liddiard* (2) Lord Denman approved and adopted this statement of the law; and *Ex parte Morgan, In re Simpson* (3) and *Trinidad Asphalte Co.* v. *Coryat* (4) in effect illustrate the same principle. There is here no suggestion of mistake. And the question for the decision of their Lordships in effect resolves itself into this: Has Makund Singh proved satisfactorily that the admissions contained in the deeds to which he was a party are untrue in fact? In the opinion of their Lordships that question must be answered in the negative.

Their Lordships must therefore hold that on the materials before them the title of the plaintiffs to recover has been disproved.

Mr. Ross, on behalf of the plaintiffs, earnestly pressed that a specific issue on this question of adoption might now be framed, and submitted for trial to the Subordinate Judge. Their Lordships consider that, as matters now stand, this would be a most undesirable course, and they are unable to adopt it.

Their Lordships will therefore humbly advise His Majesty that the appeals should be allowed, the decrees of the High Court set aside with costs, and the decrees of the Subordinate Judge dismissing the actions restored.

The respondents must pay the costs of the appeals.

Solicitors for appellant: *Ranken Ford, Ford & Chester.*

Solicitors for respondents: *Barrow, Rogers & Nevill.*

(1) (1829) 9 B. & C. 577, at p. 586.
(2) (1848) 12 Q. B. 926.
(3) (1876) 2 Ch. D. 72, at p. 89.
(4) [1896] A. C. 587.

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AND

SAIYID AKBAR HUSAIN AND OTHERS . . . DEFENDANTS. *Nov.* 14; *Dec.* 14.

ON APPEAL FROM THE HIGH COURT OF ALLAHABAD.

Civil Procedure Code, s. 291—*Sale in Execution stayed—Omission to issue fresh Proclamation—Sale after Confirmation cannot be impeached by Suit.*

Where a sale in execution of the appellants' property was stayed, and a fresh proclamation was not issued as directed by s. 291 of the Civil Procedure Code :—

Held, that as the omission to issue it had involved no loss to the appellants, and the sale had been in consequence confirmed, it was not competent for them under the clear provisions of the Civil Procedure Code to impeach the sale by regular suit.

APPEAL from a decree of the High Court (January 31, 1902), reversing a decree of the Subordinate Judge of Gorakhpur (January 12, 1899), and dismissing the appellants' suit with costs.

The plaintiffs alleged that in execution of a money decree originally obtained against them by Saiyid Muhammad Khan certain specified properties were advertised for sale on February 20, 1897; that on February 11, 1897, the Court executing the decree ordered a postponement of sale, and in accordance therewith the execution case was struck off the file of the Collector's office at Basti, whither it had been sent for execution; that on February 19, 1897, an order ex parte was obtained by the decree-holder in the absence of the judgment debtors, setting aside the order of postponement, and for bringing the property to sale, which, accordingly, was sold for a low price on February 23, 1897, a "date other than the one fixed for sale when the intending purchasers had retired"; and that the decree-holders were the purchasers under permission to bid obtained without the knowledge of the appellants. The sale was confirmed on May 22, 1897, and the prayer of the plaintiffs was to declare it incapable of enforcement.

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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Previously to this suit an application was made to the Court to set aside the sale; and the High Court, in affirming the order of confirmation dated May 22, 1897, said: "On the application of the plaintiffs in another suit, not the suit in which this decree was made, the Subordinate Judge ordered, on February 11, that the sale should be postponed, fixing no date. It was consequently a general and indefinite postponement that was made ex parte on the application of a person not a party to the execution proceedings. That was a most irregular order to make." On February 19 the Subordinate Judge "committed another impropriety which was even worse, for he cancelled his order of the 11th and directed the sale to proceed without ordering the issue of a fresh proclamation or taking any precautions to see that the parties to the execution proceedings should not be damnified." They further said, "as to irregularity, the whole proceedings were irregular and likely to cause loss to the judgment debtors, although possibly not to the decree-holder who had got permission to purchase." But they found that it was in fact without resulting loss.

Thereupon this suit was brought. The Subordinate Judge decreed the suit, holding that "when the sale was postponed on February 11, 1897, and that order was cancelled at the instance of the decree-holder, and sale was ordered to take place, a fresh proclamation ought to have been issued under s. 290, Civil Procedure Code." He referred to *Bakshi Nand Kishore* v. *Malak Chand* (1) as an authority to the effect that an infringement of the rule laid down in that section is something more than a material irregularity, and he held that it vitiated the sale, and that the sale was bad in law, and should be declared inoperative.

The High Court reversed this decree, holding that the omission to issue a fresh proclamation "is a matter concerning the publishing or conducting the sale within the meaning of s. 311"; and that no regular suit would lie.

Cowell, for the appellants, submitted that, after the injunction issued restraining the sale and the order by the Collector striking

(1) (1885) I. L. R. 7 Allah. 289.

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the case off his file, there could be no valid sale under the original order without a fresh proclamation under s. 291 of the Code. The result of the order of the Civil Court was that the sale was adjourned for more than seven days, and no fresh proclamation was made under s. 287 of the Code, and no proclamation at all was issued under the operative order to sell, which was made on February 19, and did not reach the Collector's hands until after the date originally fixed for the sale. Accordingly the sale as made, whether under the order of the 19th or the original order, was in either case unauthorized by the Code, and, therefore, inoperative and void. Reference was made to the Code of Civil Procedure, s. 289; *Bakshi Nand Kishore* v. *Malak Chand* (1); *Ganga Prasad* v. *Jaglal Rai* (2); *Mina Kumari Bibee* v. *Jagat Sattani Bibee.* (3)

De Gruyther, for the respondent Inayat Husain, contended that the suit was barred by ss. 244 and 312 of the Civil Procedure Code. The questions raised were proper to be raised before the Court executing the decree under s. 311. They had been so raised and had been disposed of by two Courts adversely to the appellants, there having been a concurrent finding of fact that there had been no resulting loss from the irregularity complained of. He cited *Tassaduk Rasul Khan* v. *Ahmad Husain.* (4)

Cowell replied.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decree of the High Court at Allahabad, reversing the decree of the Subordinate Judge, and dismissing with costs a regular suit brought for the purpose of annulling a sale in execution proceedings.

The sale was held under a decree of the Subordinate Judge of Gorakhpur by the Collector of Basti. The sale proclamation was duly issued. The sale was fixed for February 20, 1897. It was held on the 23rd, but before the Collector had finished the sales listed for the 20th.

It appears that an order was made ex parte on February 11,

(1) I. L. R. 7 Allah. 289.
(2) (1889) I. L. R. 11 Allah. 333.
(3) (1883) I. L. R. 10 Calc. 220.
(4) (1893) L. R. 20 Ind. Ap. 176.

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1897, by the Subordinate Judge of Gorakhpur staying the sale. On February 16 the Collector of Basti, in obedience to this order, struck the proceedings off the pending file. However, on the 22nd, in consequence of notice received from the Court of the Subordinate Judge, from which it appeared that the order staying the sale had been set aside, the case was then brought forward, as the Collector notes, "in continuation of the sale proceedings in other cases." The sale was commenced, but adjourned till the following day. On the 23rd the decree-holders, who had leave to bid, purchased at the auction the interest of the judgment debtors, and the sale was concluded in their favour subject to confirmation by the Civil Court.

On the application for confirmation the judgment debtors applied to have the sale annulled. The Subordinate Judge confirmed the sale, finding that, although there were irregularities in the conduct of the sale, the judgment debtors had not sustained any damage. On appeal the High Court at Allahabad confirmed the decision of the Subordinate Judge.

Then the judgment debtors brought this suit.

The order committing the sale to the Collector of Basti is not in evidence, nor does it appear clearly in what capacity the Collector sold, or on what grounds the order staying the sale was made, or on what grounds it was revoked, or whether any notice was ever given to the public that the sale had been stayed, and that the case was for a time struck off the pending file. It appears, however, to have been assumed in the present litigation, and their Lordships assume for the purpose of their judgment, that the case came within s. 291 of the Code of Civil Procedure, and that when the stay of proceedings was removed a fresh proclamation ought to have been issued in compliance with the terms of that section.

The Subordinate Judge held that, inasmuch as no fresh proclamation was issued, the sale was void, and therefore he pronounced a decree in favour of the judgment debtors.

The Court of Appeal, assuming that a fresh proclamation ought to have been issued, held that the omission was an irregularity which had involved no loss to the debtor; that the only course open to the judgment debtors was to object, as they

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did, to the confirmation of the sale, and that it was not competent for them to impeach the sale by regular suit.

Their Lordships are of opinion that the decision of the High Court is perfectly right. The provisions of the Code of Civil Procedure are, in their opinion, clear on the point.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants : *Barrow, Rogers & Nevill.*

Solicitors for first respondent : *Ranken Ford, Ford & Chester.*

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Nov. 1, 5; *Dec.* 14.

In re S. B. SARBADHICARY.

ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Letters Patent of the Allahabad High Court, ss. 7, 8—*Rules of Court, No.* 197 —*Disciplinary Authority over an Advocate—Libel on the Judges—Reasonable Cause for Suspension from Practice.*

Held, that the High Court at Allahabad had jurisdiction under ss. 7 and 8 of its letters patent, and the rules framed thereunder, to deal with the alleged misconduct of the appellant, a member of the English Bar, who had been admitted as an advocate of the Court; and that under r. 2 a division Court consisting of three judges (five being then present in Allahabad) was properly constituted in that behalf.

Held further, that it was the intention of s. 8 to give a wide discretion to the High Court in regard to the exercise of disciplinary authority.

It is "reasonable cause" for suspending an advocate from practice that he has been found guilty of contempt whilst defending, in a publication for which he was solely responsible, his misbehaviour as an advocate conducting a case before the Court by an article which was a libel reflecting upon the judges in their judicial capacity and in reference to their conduct in the discharge of their public duties.

APPEAL by special leave from an order of the High Court (July 5, 1906) suspending the appellant for four years from practice as an advocate.

The printed case for the appellant stated that "on the 19th of April, 1906, when the appellant was arguing a criminal case before Mr. Justice Richards, his Lordship became suddenly provoked

* *Present* : LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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and asked the appellant to hold his tongue. The appellant thereupon, under the influence of the grave provocation received, wrote a registered letter to the learned Chief Justice, and also wrote an article which appeared in *The Cochrane* (of which the appellant is the editor) on the 1st of June, 1906."

The article, which it is unnecessary to set out at length, is referred to in the judgment of their Lordships as constituting a libel on the judges.

On June 6 notice was served on the appellant to shew cause, and on July 5 he was suspended as above stated; the judges unanimously holding that he had been guilty of gross misconduct in publishing the article.

The *Appellant* appeared in person, and contended that the High Court had no jurisdiction over him as a member of the English Bar, and had no jurisdiction to try the case, as all the judges present in Allahabad did not sit in accordance with r. 197 of the rules of Court. Five were present in Allahabad, but only three sat. He referred to ss. 7 and 8 of the letters patent constituting the Court. The alleged offence was committed by him in his capacity of editor and not professionally as an advocate. If aggrieved the judges could have proceeded against him under s. 500 of the Indian Penal Code. He referred to *In re Rajendranath Mukerji* (1); *In re Parbati Charan Chatterji* (2); Penal Code, ss. 228, 500; *In re Wallace* (3); *In re Weare* (4); *Queen* v. *Castro* (5); *Ex parte Turner* (6); and *Lechmere Charlton's Case.* (7)

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The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The petitioner in this case, Mr. Sashi Bhushan Sarbadhicary, is a barrister of Gray's Inn, and an advocate of the High Court of Judicature at Allahabad; and he complains of an order of that Court whereby he was suspended from practice in that Court for a period of four years, from July 5, 1906, for "gross misconduct." The grounds of his appeal are nine in

(1) (1899) L. R. 26 Ind. Ap. 242.
(2) (1895) L. R. 22 Ind. Ap. 193.
(3) (1866) L. R. 1 P. C. 283.
(4) [1893] 2 Q. B. 439.
(5) (1873) L. R. 9 Q. B. 219.
(6) (1844) 3 Mont. D. & De G. 523.
(7) (1836) 2 My. & Cr. 316.

number, and, as two of them relate to the competency of the Court to make the order, it will be convenient to dispose of them in the first instance.

The first objection is that the Court "had no jurisdiction to deal with the applicant for alleged misconduct, he being a member of the English Bar."

In the opinion of their Lordships this objection is untenable. By s. 7 of the letters patent by which it was established the High Court is authorized and empowered "to approve, admit, and enrol such and so many advocates . . . . as to the said High Court shall seem meet"; and by s. 8 the High Court is empowered "to make rules for the qualification and admission of proper persons to be advocates . . . . and to remove or to suspend from practice on reasonable cause the said advocates." By r. 180 of the Court "any barrister of England or Ireland, and any member of the Faculty of Advocates in Scotland may present an application for his admission to the roll of advocates of the Court"; and on compliance with certain conditions specified in r. 181 may, under r. 182, if "the Chief Justice and judges then present in Allahabad" think fit, be admitted as an advocate of the Court. It is clear, therefore, that any barrister so admitted becomes thereupon subject to the disciplinary jurisdiction of the Court.

The second objection taken by Mr. Sarbadhicary is that the Court which dealt with the charge against him was not properly constituted under the rules of the Court. Rule 2 provides that: "A charge against an advocate . . . . in respect of any misconduct for which such person may be suspended or dismissed from practice . . . . shall be heard and decided by a bench of three judges. Such bench may, at the hearing, refer the matter for disposal to a bench consisting of five judges."

If this rule applies, there is no doubt that the Court which heard and disposed of Mr. Sarbadhicary's case was properly constituted, for it consisted of three judges. Bur Mr. Sarbadhicary contends that, under r. 197 (which provides that "the Chief Justice and judges present for the time being in Allahabad may, for good cause appearing to them, by an order in writing under the seal of the Court, suspend or remove from the

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rolls of the Court any advocate . . . . "), he was entitled to have his case heard by a bench of five judges, as that number then were present in Allahabad. The learned judges who heard the case, and before whom this objection was raised, say that " r. 197 provides for cases in which the Chief Justice and judges may for good cause, and without charge or trial, suspend or remove from the roll of the Court any advocate of the Court." And their Lordships see no reason why they should reject this explanation. An advocate convicted of a criminal offence might properly be suspended or removed from practice under this rule without further charge or trial. In their Lordships' opinion this objection also fails.

The facts of the case lie within a very short compass. On April 19, 1906, Mr. Sarbadhicary was conducting a criminal case before Richards J., when, to use the petitioner's own language, " An altercation happened between the honourable gentleman and the counsel about the administration of the oath to the accused by the magistrate who tried them. The counsel was backed by two depositions of the two accused. . . . . They were shewed to the judge (who) wanted to assail the counsel, but the latter, relying on his own innocence, stated, as had the copies (1), he was not the least to blame. The judge was angry, and said, ' Why did the counsel assail the Court below ? ' The counsel stated that, before the files reached, the copies were the only source of his information ; and sat. The judge asked the counsel to be polite, and the counsel applied (to) the judge for the same favour. The judge remarked he should not be answered back. The judge thereupon angrily said ' Sit down.' "

In an affidavit filed in this matter Mr. Sarbadhicary says the words used were " Hold your tongue." But whatever the words used, Mr. Sarbadhicary says he was " greatly affected " by them, and sent the judge a notice that " he would be legally proceeded against, both civilly and criminally, on the expiration of two months." Before this period expired, on June 1, 1906, Mr. Sarbadhicary published in a periodical called *The Cochrane*, of which he is both the editor and publisher, an article which has given rise to the order of suspension of which he now complains.

(1) Sic.

There is no doubt that the article in question was a libel reflecting not only upon Richards J., but other judges of the High Court in their judicial capacity and in reference to their conduct in the discharge of their public duties. There is also no doubt that the publication of this libel constituted a contempt of Court which might have been dealt with by the High Court in a summary manner, by fine or imprisonment, or both. The only question which their Lordships have to consider is whether the publication of such a libel constitutes "reasonable cause" for the suspension of an advocate from practice under the powers conferred by the letters patent.

Their Lordships will not attempt to give a definition of "reasonable cause," or to lay down any rule for the interpretation of the letters patent in this respect. Every case must depend on its own circumstances. It is obvious that the intention of the Crown was to give a wide discretion to the High Court in India in regard to the exercise of this disciplinary authority. The rules of the Court, to which reference has been made, indicate the precautions taken by the Court itself to secure that the powers shall not be used capriciously or oppressively, and there is no reason to apprehend that the just independence of the Bar runs any risk of being impaired by its exercise. On the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon judges in their public capacity ; and, having regard to the fact that in this case a contempt of Court was undoubtedly committed (and, as the evidence shews, not for the first time) by an advocate in a matter concerning himself personally in his professional character, their Lordships agree with the conclusion at which the judges of the High Court arrived, and that there was "reasonable cause" for the order which they made.

Among other grounds of objection to the order Mr. Sarbadhicary endeavoured to draw a distinction between "his capacity as an advocate and his capacity as an editor," and cited the case of *In re Wallace* (1) as an authority in support of his argument. But that was an entirely different case from the present. In

(1) L. R. 1 P. C. 283.

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delivering judgment Lord Westbury says (1): "It was an offence . . . . committed by an individual in his capacity of a suitor in respect of his supposed rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no connection whatever with his professional character, or any thing done by him professionally, either as an advocate or an attorney."

Here the whole controversy arose from the misbehaviour of Mr. Sarbadhicary as an advocate conducting a case before the Court, and the contempt of which he was properly found guilty was committed in the attempt to vindicate his professional conduct in a publication for which he was solely responsible.

Their Lordships will say nothing as to the character of the libel, or as to the extent of the punishment awarded. They will humbly advise His Majesty to dismiss the appeal.

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Nov. 6, 7; *Dec.* 14.

SHAHAR BANOO . . . . . PLAINTIFF;

AND

AGA MAHOMED JAFFER BINDANEEM AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Consent Decree that New Trustee be appointed by the Court—Preference to Lineal Descendants of Settlor—Discretion—Appointment of a Stranger to the Line.

Where a consent decree had been passed directing that the first respondent should retire from the trusteeship of a Mahomedan Shiah religious endowment, "and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor":—

Held, that under this decree the Chief Court had a discretion to exercise in the selection of a trustee, that the appellant, as senior in order of the settlor's children, had no absolute right to be appointed in the absence of disqualification, and that the Chief Court rightly exercised its discretion in appointing a Shiah resident in the neighbourhood, not a

* *Present*: LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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(1) L. R. 1 P. C. at p. 294.

lineal descendant of the settlor, in preference to the appellant, who, by reason of her sex, could at best discharge many of her duties only by deputy, and as a Babee might take a less zealous interest in carrying on the religious observances of the Shiah school.

APPEAL from a decree of the Chief Court (February 22, 1904), reversing a decree of that Court made in its original jurisdiction (April 1, 1903).

The suit in this case was brought on October 4, 1897, by the appellant and the fourth respondent, Haji Mahomed Cassim Bindaneem, against the first respondent, praying for the removal of the first respondent from trusteeship under the charitable bequest set out at the beginning of their Lordships' judgment, and for the appointment of a new trustee. The Recorder of Rangoon passed judgment on June 1, 1898, declining to remove him upon the ground that, though he had been careless as regards his accounts, he had not endeavoured to benefit himself at the expense of the trust, but on the contrary had paid a good deal out of his own pocket. An appeal to the High Court at Calcutta under the provisions of the Lower Burma Courts Act, 1889, which was then in force, was compromised upon terms which were embodied in the decree of the High Court dated May 13, 1902. They were that the first respondent should retire from the trusteeship and that a new trustee should be appointed in his place by the Chief Court of Lower Burma (which had in the meantime succeeded to the original civil jurisdiction of the Recorder of Rangoon), "preference in such appointment being given to the lineal descendants of the settlor"; that all accounts should be treated as settled up to the date of the decree of the Recorder of Rangoon, the first respondent not being entitled to pay or receive anything from the trust estate in relation to his management up to that date; that accounts should be taken from that date and the amount found due on such account be paid by the first respondent to the new trustee to be appointed, the costs of both parties to come out of the trust estate. Thereupon the proceedings were taken out of which this appeal arose. The first respondent petitioned that Hajee Mirza Hassim Bindaneem, the second respondent, might be appointed in his place. He set out the

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names of the testator's seven children, of whom he was the eldest. He said that the third respondent resided in Baghdad, the fourth had been in gaol for sixteen years, the fifth had no settled occupation and had squandered a considerable fortune, that the appellant, the second child, was a Babee, and that the remaining child was dead.

The appellant claimed that after the first respondent she was the next lineal descendant of the settlor, and better qualified than other heirs to carry out the provisions of the trust; she therefore prayed that she might be appointed trustee in the place of the first respondent. The fourth and fifth respondents also claimed the trusteeship; the former claiming to be appointed jointly with the appellant. The Chief Court appointed the appellant to be trustee, holding that preference should be given to her as the elder child, and that she was not disqualified either by her sex or by the fact that she was a Babee. The first, second, and third respondents appealed, and the appellate Court intimated that the appointment of the appellant would be set aside and an opportunity would be given to the parties to come to an agreement as to the new trustee to be appointed. No such agreement was come to, and on February 22, 1904, the appellate Court appointed Aga Mahomed Sherazee to be trustee. The Chief Court, in reversing the decision of the Court below, held that the only three lineal descendants of the testator eligible as trustees were the appellant, the second respondent Mirza Hassim, and the third respondent Mirza Jawad; that by Mahomedan law the appellant was not disqualified from being a mutawalli or trustee, either on the ground of her sex or of her religion; that the objects of the trust did not involve any duties of a spiritual nature, such as taking part in or conducting religious services or the like, and that they could be carried out by a deputy. But it went on to say that the trust had reference to religious observances of the Shiah sect, to which the testator belonged, and that accordingly the appellant, though not disqualified, was not a right person to be selected as trustee, because she would have to perform her duties by a deputy and had no sympathy with or interest in such religious observances, and there was no guarantee that she would appoint a proper deputy. The Chief Court further held that there

were objections to the second and third respondents Mirza Hassim and Mirza Jawad, on the ground that they were theretofore resident at Baghdad, and there was no guarantee that they intended to reside permanently at Rangoon, and it was desirable that the trustee should be a resident of Rangoon, where the duties of the trust were to be performed. In default of the selection of Mirza Hassim or Mirza Jawad or some other suitable person by all parties to the appeal, the Court held that they had power to appoint some one not a lineal descendant and not a member of the testator's family.

Roskill, K.C., and *J. W. McCarthy*, for the appellant, contended that on the evidence she was the only fit and eligible lineal descendant of the testator, and that preference should be given to her. She fulfilled all the conditions required by Mahomedan law entitling her to the appointment; and therefore had under the decree an absolute right to the trusteeship precluding any exercise of discretion by the Court. There was a concurrent finding that she was not in fact or law disqualified either on the ground of sex or religion. A woman can be appointed mutawalli: see Sir R. Wilson's Digest of Anglo-Mahomedan Law, 2nd ed., pp. 375, 377; Tagore Law Lectures, 1885 (by Ameer Ali, J.), 1st ed. p. 246, 3rd ed. p. 344; *Hussain Beebee* v. *Hussain Sherif* (1); *Doe* v. *Abdollah Barber*. (2) There was no legal evidence what the tenets of the Babee sect were, or wherein they differed, if at all, from the Shiahs, or that the Babees were heretical or regarded by Mahomedans as unfit trustees of religious trusts. The Babees could not be assumed to be apostates. The Chief Judge referred to Lord Curzon's book "Persia and the Persian Question," and to a work by Mr. E. G. Browne, being the new History of Mirza Ali Muhammad the Bab, to shew that Babees were not Mahomedans; but in a later preface to another writer's book on the subject (3) (1903)

(1) (1868) 4 Madr. H. C. 23.

(2) (1838) Fulton, 345.

(3) The book referred to is Myron H. Phelps' Life and Teachings of Abbas Effendi: New York and London, 1903. Prof. Browne, however, has kindly informed us that belief in the inspiration of the Koran is no more a sufficient test of Mahomedanism than belief in the inspiration of the Pentateuch is of Christianity. It is an essential tenet of Islam that the

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Mr. Browne changed his opinion, saying that Babees believe in the divine inspiration of the Koran. Besides, the management of the trust did not involve any spiritual duties which the appellant was unable to perform either as a woman or Babee. If it did, they could be performed by deputy. A Shiah, for instance, can manage a Sunni endowment: see *Doyalchand Mullick* v. *Keramut Ali*. (1) A non-Mahomedan can be appointed, but not where a qualified member of the founder's family exists, especially where by consent of all parties preference is to be given to her.

Upjohn, K.C., and *Cowell*, for the first respondent, contended that the appellant, both as a woman and a Babee, was not qualified by Shiah law to perform adequately the duties of the trust. Even assuming that she could perform them by deputy, the Court exercised a sound discretion in not selecting her for the post. Under the consent decree the duty of selection was vested in the Court. Even if the appellant were eligible, she must shew that the Court's discretion in declining to appoint her ought to be everruled. None of the members of the family supported her nomination, except one who claimed to be appointed her co-trustee. There were directions in the will which could only be properly carried out by a male Mahomedan. The appointment of a non-Mahomedan to be mutawalli of a religious trust was not permitted by the doctrines of the Shiah sect. Reference was made to Ameer Ali's Tagore Law Lectures, 1885, 3rd ed. (1904) pp. 346, 351, 353, 391, 397, and 403; Sir R. Wilson's Anglo-Mahomedan Law, pp. 375, 377. The appellant, under the circumstances, derived no right to the office, nor any preferential claim thereto, by being the eldest lineal descendant of the testator: see *Sayad*

Koran is a final revelation and Mahomet the last of the prophets, and the Babis deny both. The full title of Prof. Browne's own work above mentioned is "The Tarikh-i-Jadid, or New History of Mirza Ali Muhammad the Bab . . . translated from the Persian": Cambridge, 1893; see also "A traveller's narrative written to illustrate the episode of the Bab," Cambridge, 1891. It would appear that there is no real inconsistency. The Babis, at all events, are not recognized as true believers by Mahomedan rulers, and if in their jurisdictions individual members of the religion pass as Muslims it is for reasons of prudence. —F. P.

(1) (1871) 16 S. W. R. 116.

Abdula Edrus v. *Zain Sayad Hasan Edrus*. (1) No objection waa even alleged against the person selected by the Court, who as a resident Shiah could efficiently supervise the management both of the trust property and of the religious ceremonies and duties. Reference was made to *Doyalchand Mullick* v. *Keramut Ali* (2) ; *Pirani* v. *Abdool Karim*. (3)

Roskill, K.C., replied.

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The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. Hajee Ahmed Bindaneem, a Shiah Mahomedan, died in 1882, leaving a will by which he devoted the one-third of his estate of which he was capable of disposing to religious and charitable purposes. The testator left six sons and one daughter, of whom the eldest was a son Mahomed Jaffer, the first respondent, and the second a daughter, Shahar Banoo, the appellant. In his will the testator said : "I appoint my obedient son Aga Mahomed Jafler Bindaneem my legal executor. And the superintendence of all the affairs relating to the heritage and the sools is entrusted to Aga Ahmed Ispahani." He further said :—

"5. The furniture, such as lamps, utensils for cooking, carpets, silver alams, silver sarposh, and all the articles belonging to the Emambara, shall not be the subject of inheritance, and shall be used by the executor in performance of taziadari rites. . . . .

"6. The executor shall, after taking possession, with the information of the nazir, of the sools, purchase therewith (in the) share market any good property or Government paper, and shall out of the income thereof spend Rs. 1,000 during the first ten days of Mohurrum every year, in accordance with the custom in vogue, in performance of the taziadari and distribution of food in connection with the Emambara. The expenses that are to be preferred to all the expenses to be met out of the income of the said property, are those of sending money to Kerbela or Holy Najaf and engaging naib (proxy) on remuneration for the performance of prayer and fasting in my stead for the omissions during sixty years of my age ; provided these be done through

(1) (1888) I. L. R. 13 Bomb. 555, 562.
(2) 16 S. W. R 116.
(3) (1891) I. L. R. 19 Calc. 203.

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my mujtahid. And next to these are the expenses of engaging naib for visiting Khana-e-Khuda (House of God), the holy shrine of the Prophet and those of Imams (who guided people in the right path), and for visiting the shrine of Raza (on whom may God send His thousand blessings). Next to these are the expenses of heirs and nearest relatives, if they stand in need, or the expenses of repairing mosques or performance of taziadari on the nights preceding Friday, and distributing food, and feeding travellers, to the possible extent."

Mahomed Jaffer obtained probate of the will, and carried on the administration of the estate until 1897. In that year the present appellant and other members of the family, who are or were parties to the present appeal, brought a suit in the Court of the Recorder of Rangoon against Mahomed Jaffer, in which they charged him with certain breaches of trust. They asked that the trustee should be removed from his office, and that a nazir should be appointed.

In 1898 the Recorder of Rangoon made his decree, by which he refused to remove the trustee from his office, but directed him to keep proper trust accounts for the future. Against that decree an appeal was brought, in accordance with the law then in force, to the High Court at Calcutta. While the case was before that Court a compromise was arrived at, in accordance with which a decree was passed on May 13, 1902, by which it was decreed that Mahomed Jaffer should retire from the trusteeship "and that a new trustee be appointed in his place by the Chief Court of Lower Burma, preference in such appointment being given to the lineal descendants of the settlor."

Upon that the case went back to the Chief Court in Rangoon, and was disposed of in the first instance by Chitty J. At that stage of the case several different members of the family claimed to be entitled to the trusteeship, but of those claims it is only necessary, for the purpose of the present appeal, to notice that put forward on behalf of the now appellant, the principal plaintiff in the suit. Her case was that as the next in seniority, after the retiring trustee, of the children of the testator, she was entitled to be appointed trustee or mutawalli of the endowment. Two specific objections to her appointment were raised—first,

that as a woman she was disqualified from carrying out the trusts; secondly, that, being a member of the Babee sect, she was excluded from the trusteeship of an orthodox Shiah endowment.

The learned judge overruled these objections, and appointed the lady to the position which she sought. An appeal against that order was heard before the Chief Judge and Bigge J. Those learned judges agreed with Chitty J. in thinking that there is no legal prohibition against a woman holding a mutawalliship when the trust, by its nature, involves no spiritual duties such as a woman could not properly discharge in person or by deputy. And it appears to their Lordships that there is ample authority for that proposition.

It was held secondly, in accordance with the view of the First Court, that "the objects of the trust do not seem to involve any duties of a spiritual nature such as taking part in or conducting religious services or the like, and that they could be carried out by a deputy." This proposition is perhaps not quite so clear as the first; the case seems to be rather close to the line. But for the purpose of the present judgment their Lordships assume the view taken in Burma to be correct.

The Court of Appeal also agreed with the First Court in holding that one who is not a Mahomedan, and a fortiori one who is so but who follows a sect not orthodox according to the standard of the settlor, is not disqualified by law for the post of mutawalli. The authority for this view is somewhat scanty, but for the purpose of the present judgment their Lordships assume it to be correct.

But having conceded these points in favour of the now appellant, the learned judges held that they did not necessarily conclude the case, but that the Court had still a discretion to exercise in the selection of a trustee. In exercising that discretion they took into account the nature of the duties imposed upon the trustee, the fact that the appellant, by reason of her sex, could at best discharge many of her duties only by deputy, and the circumstance that the appellant is a Babee, and as such might take a less zealous interest in carrying on the religious observances of the Shiah school. And in the result the learned

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judges set aside the order which nominated the appellant, and appointed as trustee one Aga Mahomed Sherazee, who appears to be a Shiah resident in Rangoon, not apparently a lineal descendant of the testator. Against that order the present appeal has been brought.

On the argument of the appeal it was not disputed that the rights of the parties, as between themselves, are governed by the terms of the consent decree of May 13, 1902, which directed merely that a new trustee should be appointed by the Chief Court, "preference in such appointment being given to the lineal descendants of the settlor." But it was said (and no doubt rightly) that, in construing that decree, account should be taken of what the previously existing rights of the parties under the Mahomedan law were. And it was contended that under that law, and therefore (it was said) under the consent decree, the appellant, as the senior in order of the children of the testator, not being subject to any legal disqualification, had an absolute right to the trusteeship, and that the Court possessed no such discretion as it claimed to exercise.

Their Lordships' attention was called to the earlier texts bearing upon the matter, which are few in number, and to the interpretation placed upon them by modern writers. The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution.

Their Lordships are of opinion that the Court had a discretion to exercise in the selection of a trustee, and that the circumstances by which the learned judges were guided in the exercise of that discretion were matters proper for their consideration. Their Lordships see no reason to dissent from the conclusion arrived at. They will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs.

Solicitors for appellant : *Bramall & White.*

Solicitors for first respondent : *A. H. Arnould & Son.*

BOMANJEE COWASJEE . . . . . APPELLANT;

AND

THE CHIEF JUDGE AND THE JUDGES OF THE CHIEF COURT OF LOWER BURMA . . . . . RESPONDENTS.

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ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Charges against an Advocate—Evidence—Conviction Reversed.

The appellant, a barrister and advocate of the Chief Court of Lower Burma, was charged before the said Court with gross professional misconduct in that—(1.) whilst employed as an advocate for the prosecution in an abduction case he advised the prosecutor's family to say nothing about letters having been received from his abducted daughter, and designedly withheld from the police and the senior advocate for the prosecution the fact that such letters had been received; (2.) that whilst the trial was proceeding, and while acting as an advocate for the prosecution, he suggested or hinted to the prosecutor that he should influence or attempt to influence by improper means a certain expert witness in handwriting to give evidence favourable to the prosecution in connection with certain letters produced. He was acquitted on the first charge, but convicted on the second and dismissed from his office as an advocate of the said Court:—

Held, on an examination of the evidence, that he must be acquitted on the second charge also. Evidence given by the said senior advocate and by the Government advocate of the prosecutor's statements to them in the absence of the appellant, even if admissible, could not avail to contradict the prosecutor's sworn denial that the appellant had advised him to bribe. Other evidence given was wholly insufficient, and the improbabilities of the appellant having acted as charged were very great.

APPEAL by special leave from an order of the above Court (March 21, 1906).

The two charges against the appellant, which were contained in an order of the Chief Court calling on the appellant to shew cause, are set out in their Lordships' judgment, as also the material facts relating to the prosecution in connection with which they were made.

The Court below said that the appellant's explanation as to the

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first charge was not very satisfactory, but they were constrained to hold that it was not proved. In convicting him on the second charge, it said that the only reliable evidence as to what the appellant said to Ohn Ghine was Mr. Eddis' statement as to what Ohn Ghine had admitted to him, which statement it fully believed. The judgment of the Court concluded as follows:—

"The statements of Mr. Cowasjee which Mr. Eddis has related, viz.: (1.) The bargain is not yet completed; (2.) I have advised Ohn Ghine to bribe Hardless, or words to that effect; (3.) I have never advised a client to do so before, but in this case I thought it necessary, are statements which would naturally leave a vivid impression on his memory. If, as we believe, he is a truthful witness, it is difficult to see how these statements could be false in the sense of being mistaken. The statement made to Mr. Eddis by Ohn Ghine after Ohn Ghine had been informed that Mr. Cowasjee himself had said that he advised him to bribe Hardless, was 'Oh, Mr. Eddis, he only gave me a hint.' This statement also must have strongly impressed Mr. Eddis, and we are unable to hold that there was any room for mistake as to its meaning. Mr. Eddis receives corroboration from persons of undoubted respectability to whom he repeated the statements on the same day after the lapse of a few hours. It is quite clear that his evidence accords with the impressions that were on his mind on the day on which the events occurred. The defence has given no consistent explanation of these incriminating circumstances. On the contrary, for reasons that have already been fully stated, the very strongest inference has been raised that the defence is false and that it was concocted after the events. It is urged that it is improbable that a barrister and advocate of long standing, of much experience, and of great wealth, would commit professional and social suicide, by committing an act of gross misconduct, and immediately disclosing it to another advocate, as Mr. Cowasjee is alleged to have done. We admit the improbability, but we cannot escape the conviction that the evidence forces upon us. We find that it is proved beyond reasonable doubt that Mr. Cowasjee on the 2nd February said to Mr. Eddis, 'I have advised Ohn Ghine to bribe Hardless,' or words to that effect, and also the words, 'I have never advised a client to do so

before, but I thought it necessary in this case,' and that Mr. Cowasjee actually did what in these statements he admitted that he had done, and advised Ohn Ghine to bribe Hardless.

"We find that Mr. Cowasjee is guilty of gross professional misconduct as charged in the second charge. There can be no professional misconduct more gross than this—an advocate who is representing the Crown in a criminal trial advises his client to bribe a witness to obtain a conviction. There is only one order that we can pass in such a case. We direct that Mr. Bomanjee Cowasjee be dismissed from his office as an advocate of this Court. As Mr. Hardless has been frequently mentioned in these proceedings we desire to add that there is not a word of evidence from which it can be inferred that a bribe was ever offered to him or that there is any stain on his character."

Rufus Isaacs, K.C., and *J. W. McCarthy*, for the appellant, contended that the Court below was wrong in finding that the appellant's explanation on the first charge had been unsatisfactory. In support of the second charge it had admitted and relied upon evidence which was not admissible in law. The only direct evidence was that of Mr. Eddis, who spoke to a hurried conversation with the appellant which did not take half a minute, in which the appellant was said to have stated to the effect that he had advised Ohn Ghine to bribe Hardless, and added that he had never advised a client to do such a thing before. The appellant denied this on oath, and Ohn Ghine swore that he had never received such advice, but understood that he was receiving a hint to watch Hardless. The evidence shewed that Hardless was watched, but was not bribed or open to bribes. The judges found that there was no evidence affecting Mr. Hardless's character, or from which it could be inferred that a bribe had been offered to him. They then admitted Mr. Eddis' evidence of conversations between him and Ohn Ghine, between him and the commissioner of police, his partner and assistant, and Ohn Ghine's statements to the Government advocate, all of them in the appellant's absence. These were inadmissible. They then referred to ss. 154 and 155, sub-s. 3, of the Indian Evidence Act. The judges were wrong too, it was contended, in

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allowing the Government advocate, who was conducting the prosecution, to be called as a witness and also to cross-examine Ohn Ghine, who had been called in support of the charges. It was contended that there was a complete absence of reliable evidence, and that what was admitted was mostly hearsay : see s. 157 of the Indian Evidence Act.

The judges of the Chief Court did not appear.

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On November 14 their Lordships stated that they would advise a reversal of the judgment appealed from, and on December 14 the following reasons therefore were delivered by

LORD DAVEY. This is an appeal from an order, dated March 21, 1906, of the Chief Court of Lower Burma, by which order the appellant was dismissed from his office as an advocate of that Court.

The appellant was called to the Bar by the Honourable Society of Lincoln's Inn on November 17, 1891, having previously been admitted as an attorney of the Calcutta High Court in 1879, and from the year 1881 was an advocate of the Court of the Recorder of Rangoon until the establishment of the Chief Court of Lower Burma, and from that date he has been an advocate of the last-named Court.

On March 9, 1906, the appellant was served with an order of the Chief Court, whereby he was called upon to shew cause why he should not be dismissed or suspended from his office as advocate of the Court in the event of two charges which had been framed by the Court, or either of them, being found to be true. These charges were as follows :—

"1. That you whilst employed as an advocate for the prosecution of Maung E. Maung and others charged with having abducted Mah Noo, the daughter of Maung Ohn Ghine, C.I.E., and his wife, Mah Yeik, having been made aware that some letters had been received by members of Maung Ohn Ghine's family which purported to be Mah Noo's, advised the family to say nothing about such letters having been received, and designedly withheld from the police and from Mr. Eddis, the senior advocate conducting the prosecution, the fact that such letters had been received, and you were thereby guilty of gross professional misconduct.

"2. That you, whilst the trial of the said Maung E. Maung and others was proceeding at the first criminal sessions of this Court in this year, and when you were acting as one of the advocates for the prosecution, suggested or hinted to the said Maung Ohn Ghine that he should influence or attempt to influence Mr. Hardless, a professing expert in handwriting, by improper means in order that Mr. Hardless might be induced to express opinions favourable to the prosecution's case in connection with certain letters produced during the course of the said case, and you were thereby guilty of gross professional misconduct."

The circumstances in which these charges came to be made against the appellant were shortly as follows. The appellant had been engaged as junior counsel with another advocate (Mr. Eddis) to conduct the prosecution of certain persons charged with the abduction of a girl named Mah Noo, daughter of one Ohn Ghine, both in the magistrate's Court and at the trial at the criminal sessions. Ohn Ghine was absent from Burma when the prosecution was commenced, and returned on August 17, 1905, while the case was pending in the magistrate's Court. A day or two previously some member of the family informed the appellant that letters purporting to come from Mah Noo had been received by her mother. And the appellant said they would go into them on Ohn Ghine's arrival, which he was told was expected in two days. After his arrival the letters were at once handed to the commissioner of police. This was the substratum of fact on which the first charge was founded. During the trial in the Sessions Court, which took place in February, 1906, certain other letters purporting to have been written by Mah Noo which, if genuine, tended to shew that the case was one of voluntary elopement and not abduction, were produced for the defence. Mr. Hardless, who is described in the judgment of the Chief Court as "the Government of India expert in handwriting," happened to be in Rangoon, and was asked by the commissioner of police to give evidence as to the genuineness of these letters. Ohn Ghine was under the impression (without, it should be said, the slightest apparent foundation) that Mr. Hardless had been or would be bribed by the other side, and more than once pressed

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his fears upon both Mr. Eddis and the appellant. As they were going into Court on Friday, February 2, the appellant said something to Mr. Eddis which conveyed to his mind the impression that the appellant had advised Ohn Ghine to bribe Mr. Hardless. Mr. Eddis did not profess to remember the words used by the appellant, but was certain that the appellant went on to say that he had never advised a client to do such a thing before, but in this case he thought it necessary. This hurried conversation was the foundation of the second charge.

The learned judges held that it had not been proved that the appellant was guilty of the first charge. The evidence given in support of this charge is not directly material on the second charge, but it is not unimportant as shewing a certain inexactness in Mr. Eddis' memory of spoken words, and a tendency in his mind to give a colour to words used in conversation which they do not necessarily bear. For example, Mr. Eddis stated in his evidence that he told Mr. McDonnell, the commissioner of police, that "Cowasjee had known about the letters all the time," and this was confirmed by McDonnell. But Mr. Eddis admitted that he had not asked the appellant how long he had known about them, and made no inquiries from him at all at any time as to when he got them. And the fact (as proved) was that the appellant had known of the existence of the letters only two days before they were produced.

On the second charge Mr. Eddis was corroborated by Mr. Lentaigne, his partner, Mr. Clifton, an assistant in his office, and Mr. McDonnell, who severally stated that Mr. Eddis had on the same day repeated to them his impression of the effect of his conversation with the appellant. This evidence was admissible under the Indian Evidence Act (s. 157), but it only tends to support the credibility of Mr. Eddis, and does not carry the matter any further on the real issue, whether the appellant did in fact advise Ohn Ghine to bribe Mr. Hardless.

The appellant's story is thus stated in his evidence in chief: "I never had any conversation with Mr. Eddis in the Bar library with regard to bribing Mr. Hardless. I had conversation with him in his own chambers, and also in the corridor of this Court with regard to Hardless. Mr. McDonnell was then standing

with his hand on the railing of the passage leading to the lavatory. The conversation in Mr. Eddis' chambers was on the previous day. In his chambers I told Mr. Eddis that Ohn Ghine told me that the defence were trying to bribe Hardless, and that Ohn Ghine wanted me to get the commissioner of police to set a watch on Hardless, and that I had told Ohn Ghine that this was impossible for me to do unless there was some tangible proof of attempts being made by the defence. I did not on that occasion say anything to the effect that I would advise Ohn Ghine to bribe Hardless. Mr. Eddis told me on that occasion that Ohn Ghine had also spoken to him on the subject. From what has transpired in Court during this inquiry, I am inclined to think the conversation in the corridor was on the Friday. When I wrote my explanation I was in doubt whether it was on the Friday or on the Monday. When I came to Court that day I met Ohn Ghine, who told me that we had done nothing in the matter, and Hardless had been got over and was going to give evidence against the prosecution. I said I did not believe it. He insisted that this information was reliable. Before that I had told him that if the bribery had taken place he would not have the means of knowing it. When he insisted I lost my temper to a certain extent, and said that 'If the other side could have done that, you could have done it too.' I then went and got my gown and went downstairs to the Original Civil Court, where I had something to do. When I came up I met Mr. Eddis at the top of the stairs as he was coming out of the Bar library, and I told him all that had happened between me and Ohn Ghine. While we were finishing the conversation the Court gong sounded and we both went to the Sessions Court. When I was talking to Ohn Ghine in the corridor before going downstairs I did not see either Mr. Eddis or Mr. McDonnell near by. I spoke to Ohn Ghine near the jury room. I did not take Mr. Eddis aside. I spoke to him as one advocate would speak to another about a delicate matter. I never on that occasion or at any time said to Mr. Eddis that I had never done such a thing before, but I had advised Ohn Ghine to bribe Hardless, as I thought in that case it was necessary. In the Sessions Court Mr. Eddis said to me,

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'This is a serious matter. You ought to speak to Mg. Ohn Ghine and tell him that there ought to be nothing of the kind in this case.' I laughed and said, 'Mg. Ohn Ghine is not such a fool as to misunderstand me. That was all that passed between me and Mr. Eddis on that occasion. I never heard anything more about the matter until Mr. Giles spoke to me on February 27. Mr. Eddis never referred to the matter again in my hearing. I have no recollection of having used the words, 'The bargain is not yet closed or completed.' I could not have used such words, because my information was definite that Hardless had been bribed, and that he was going to give evidence against the prosecution. Ohn Ghine told me definitely that Hardless had been bribed, and he insisted that his information was reliable."

Mr. Eddis' account of the conversation in Court was as follows: "When we got into Court I said that nothing of the kind he had just told me could possibly be allowed, and he must tell Ohn Ghine so. The case was then going on, and to the best of my knowledge I was standing up examining a witness. He made no reply."

It is, of course, quite possible that under these circumstances, when Mr. Eddis' attention was engrossed in the examination of a witness, he may not have heard the appellant's reply, or it may have failed to attract his attention.

The occasion and supposed effect of the statement alleged to have been made by the appellant that "the bargain is not yet completed" is veiled in some obscurity. It is put by McDonnell in a previous conversation between the appellant, Mr. Eddis, and himself on the same morning, Friday, February 2, and that is confirmed by Mr. Eddis in his examination-in-chief.

"There was a rumour flying about that Hardless's evidence would be in favour of the defence, and I cannot purport to give the whole of what occurred, but Cowasjee said, if that was so, Hardless must have been bribed, and then went on to use these words, 'The bargain, however, is not yet completed'."

In his cross-examination he enlarges the statement into "The bargain is not yet completed. I do not say that Hardless is bribed; the bargain is not complete." The appellant denies

having made the statement at any time. No very definite meaning can be attached to the words, which, however, appear to refer to the apprehended action of Ohn Ghine's opponents. And their Lordships do not attach any weight to them for the present purpose.

The Government advocate in support of the case against the appellant called Ohn Ghine. After a few questions, the answers to which the learned counsel considered unsatisfactory, he obtained leave to treat Ohn Ghine as a hostile witness and cross-examine him. But no admission was elicited from the witness that the appellant had advised him to bribe Hardless, and in fact he explicitly denied it. The Court expressed the opinion that Ohn Ghine was a witness in whom they could place no reliance.

Even before Ohn Ghine's examination, when there was no question of discrediting him, Mr. Eddis, in answer to questions from the Chief Judge, had stated the particulars of interviews he had with Ohn Ghine in the absence of the appellant, and repeated statements then made to him by Ohn Ghine. And after Ohn Ghine had been examined the Government advocate went himself into the witness-box and was allowed to state the particulars of a long conversation between Ohn Ghine and himself. The learned judges in their judgment say: "The only reliable evidence as to what Mr. Cowasjee said to Ohn Ghine in the corridor on the morning of February 2 is the statement of Mr. Eddis as to what Ohn Ghine admitted to him in the tiffin interval."

Their Lordships are of opinion that the evidence given by Mr. Eddis and by the Government advocate was inadmissible for the purpose for which it was used, or as against the appellant. Even if it was admissible for the purpose of impeaching the credit of the witness under s. 155, sub-s. 3, of the Indian Evidence Act, what would it prove? It might prove that Ohn Ghine was an unrealiable witness who said one thing one day and another thing another day, and tend to discredit his sworn statement, but it would not prove the truth of his unsworn statement or make it evidence against a third person. Ohn Ghine was questioned by the Government advocate as to what he had said to Mr. Eddis,

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but he adhered to his statement that "the hint" of which Mr. Eddis had spoken was a hint to have Mr. Hardless watched, and that the appellant had never advised him or hinted to him to have Mr. Hardless bribed. It appears that he did in fact take measures to have Hardless watched. Their Lordships are disposed to agree that Ohn Ghine's evidence cannot be implicitly relied on. On the other hand, they cannot accept Mr. Eddis' statement of his conversation with Ohn Ghine as admissible evidence against the appellant. But, in saying so, they think it fair to the appellant to say that the words attributed to Ohn Ghine by Mr. Eddis appear to them capable of a different construction from that put upon them by the learned judges.

There is, therefore, no direct evidence that the appellant in fact advised Ohn Ghine to attempt to bribe Hardless, and the only evidence in support of the second charge against the appellant which has to be considered is Mr. Eddis' report of (1.) a hurried conversation lasting some half minute, as to the greater part of which he cannot remember the words used, and as to the rest of which the words deposed to are innocent or otherwise according to the context; and (2.) a whispered conversation between two barristers in Court, whilst one of them was on his legs examining a witness. Their Lordships are of opinion that such evidence is quite insufficient to support the grave charge made against the appellant.

In a case of this kind it is permissible for judges of fact to consider the probabilities. It is improbable that a man of the appellant's experience could suppose that a witness like Mr. Hardless was amenable to be bribed to give false testimony, or not have known that any attempt to influence him in that way would recoil on him who made it. It is yet more improbable that a man in the appellant's professional position would imperil his whole future in such a manner or for such a purpose. And it is almost impossible to believe that if he did so he would at once go and tell it to a leading European advocate, and that too in a public place where he might be overheard.

Mr. Eddis does not seem at first to have taken so serious a view of the matter as he afterwards did. His continuing to conduct the abduction case with the appellant may be explained by his

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unwillingness to inflict an injury on his client, but it is difficult to understand why, believing all he did about the appellant, he appeared in another case with him as his leader on the following February 23.

For these reasons their Lordships thought it their duty, as they stated on November 14, humbly to advise His Majesty that the order appealed from be reversed, and that the appellant Mr. Bomanjee Cowasjee be restored to his office as an advocate of the Chief Court of Lower Burma as from March 21, 1906. The appellant very properly does not ask for any costs of this appeal.

Solicitors for appellant : *Bramall & White.*

LAL BAHADUR AND OTHERS . . . . . PLAINTIFFS;

AND

KANHAIA LAL . . . . . DEFENDANT.

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ON APPEAL FROM THE HIGH COURT AT ALLAHABAD.

Hindu Will—Issue as to Joint or Separate Estate—Onus probandi—Nucleus of Ancestral Estate—Blending of Self-acquired and Joint Funds.

In a suit by the two younger sons of a Hindu testator against the eldest to set aside their father's will as an invalid and void disposition of joint family estate :—

Held, that it being established by the evidence that from the time of the testator's separation from his brothers there had been a considerable nucleus of ancestral estate in his hands, and that he and his sons had lived as a joint Hindu family, the onus was upon the defendant to shew that any properties disposed of by the will were the self-acquired properties of the testator.

Held, also, overruling the High Court, that this onus had not been discharged. It was shewn that the testator did not discriminate between the sources of his income, but blended them all in one general account, and that the earnings of his sons were thrown into the common stock. Purchases by the testator by or with the assistance of funds so obtained could not by Hindu law be regarded as self-acquired.

APPEAL from a decree of the High Court (December 21, 1901), reversing a decree of the Subordinate Judge of Bareilly (March 30, 1898).

**Present* : LORD DAVEY, LORD ROBERTSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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The suit was to declare the will of Durga Parshad invalid and void, as an authorized disposition of ancestral joint estate without the consent of his three sons, who were the parties to the suit. The plaint stated that Gobind Ram, the testator's father, had died forty-eight years previously leaving property to the value of Rs. 35,000; that the testator had received a good education by means of the ancestral funds, which had been the cause of his subsequent prosperity; that the testator and his brothers lived jointly till 1866, when the ancestral property was partitioned; that the testator had occupied various Government posts till 1885, when he retired on a pension of Rs. 4,000 a year; that he had accumulated the income of his share of the ancestral property, and valuable estates had been purchased with their accumulations; and that he died on April 6, 1894, leaving the property scheduled in the plaint. The plaint, after referring to the two wills and the proceedings on them, contended that Durga Parshad had no right according to Hindu law to divide by his will the property without the consent of all the partners.

The case for the defendant was that the whole of the property in suit was acquired by Durga Parshad himself with the savings from his income, and that Gobind Ram, the grandfather of the defendant, left no funds or immovable property.

The Subordinate Judge set aside the wills, but the High Court dismissed the suit as regards the bulk of the properties disposed of.

It said: "The principal questions which we have to determine in this appeal, are, firstly, whether Gobind Ram left any and what property; and, secondly, whether the property in suit, or any portion thereof, is the self-acquired property of Durga Parshad. We shall also have to consider the further question whether Durga Parshad threw any of his self-acquisitions into the common stock."

After a full review of all the evidence the judgment was concluded as follows: "In my judgment the plaintiffs have failed to substantiate their claim except as to the grove in Salehnagar and the dwelling-house called the 'dewankhana,' both of which are ancestal property. As to these two items of property, the will of Durga Parshad cannot have any operation so as to deprive

the plaintiffs of their vested interest in them. To this extent the decree of the Court below should, I think, be sustained, but the remainder of the claim must be dismissed, the appeal allowed, and the decree of the Court below set aside."

Raikes, for the appellants, contended that, as the family was a joint Hindu family and admittedly possessed of some ancestral property, the onus was on the defendant to shew that the properties in suit had been purchased with self-acquired funds. That onus had not been discharged. The plaintiffs, moreover, had shewn that the testator had mixed his own funds with his ancestral and joint funds, and that he had lived jointly with his sons till his death. He had, moreover, received a special education at the expense of the ancestral funds, and therefore his subsequent earnings were not by Hindu law self-acquired, but belonged to the joint estate so long as the family remained joint. He referred to *Rampershad Tewarry* v. *Sheo Churn Doss* (1); *Dhurm Das Pandey* v. *Shamasoondri Dibiah* (2); *Gopee Krist Gosain* v. *Gungapersaud Gosain* (3); *Luximon Row Sadasew* v. *Mullar Row Bajee* (4); *Gooroochurn Doss* v. *Golukmoney Dossee* (5). *Lakshman Mayaram* v. *Jamnabai.* (6); *Durvasula Gangadharudu* v. *Durvasula Narasammah.* (7)

Ross, for the respondent, contended that upon the evidence the properties in suit other than those excepted from the decree of the High Court must be held to be self-acquired by the testator. The evidence shewed that they had not been acquired by the use of joint ancestral funds. It failed to establish that the testator had voluntarily thrown any portion of his self-acquired property into the common stock. The High Court had examined the accounts filed by the plaintiffs, to which the Subordinate Judge paid little or no attention, and these supported the defendant's contention. He referred to Mayne's Hindu Law, 6th ed. s. 280, and other sections on self-acquisition.

Raikes replied.

(1) (1866) 10 Moo. Ind. Ap. 490, 505.
(2) (1843) 3 Moo. Ind. Ap. 229, 240.
(3) (1854) 6 Moo. Ind. Ap. 53.
(4) (1831) 2 Knapp, P. C. 60.
(5) (1843) Fulton, 165, 174.
(6) (1882) I. L. R. 6 Bomb. 225.
(7) (1872) 7 Madr. H. C. 47.

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The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The litigation in this case began between three brothers, sons of one Durga Parshad, two of whom, named Lal Bahadur and Jagdamba Parshad, brought a suit against their elder brother Kanhaia Lal, the present respondent, to set aside a will made by their father, which they contended was invalid and void according to Hindu law. Jagdamba Parshad has died since the institution of the suit and his minor sons represent his interest in this appeal.

Durga Parshad was one of the three sons of one Gobind Ram, and it is admitted that he separated from his two brothers, Jwala Parshad and Hazari Lal, in 1866. Up to that time the three brothers had formed a joint Hindu family; but a complete partition of the family property, whatever it was, was then made between them. At the date of the partition two of Durga Parshad's sons, Kanhaia Lal and Lal Bahadur, were living; the third son, Jagdamba Parshad, was born subsequently.

The most important question which their Lordships have had to consider has been how much (if any) of the property then partitioned was ancestral; and this depends upon how much property was left by Gobind Ram at the time of his death in 1849. For the respondent it was at one time contended that "he left no funds or immovable property"; but that contention has since been abandoned. In the High Court Banerji J. found that the only immovable property left by him was a grove in Salehnagar, which is valued at Rs. 666 in the plaint, and a dewankhana, which,it is admitted, was awarded to Durga Parshad at the time of the partition. But Aikman J., while concurring generally with the judgment of Banerji J., held that certain estates known as Fatehpur and Sagalpur must also be treated as having descended from Gobind Ram. And at the hearing before their Lordships the learned counsel for the respondent admitted that a third estate, named Abhairajpur, must be taken as standing on the same footing as the two awarded by Aikman J. There is therefore no doubt that these five properties at least were inherited from Gobind Ram.

There is evidence that he had other properties also. A witness called on behalf of the respondent, named Bhairon Parshad, who

is quite unconnected with the family, but a relative of the banking firm by which Gobind Ram was employed, says that he used to see Gobind Ram. "He was a patwari (of several villages), and a karinda (agent) of Chaudhari Naubat Ram," the witness's uncle. "He used to come to Chaudhari Saheb's house." "He was worth Rs. 20,000 or Rs. 24,000." As this witness was twenty-one years of age at the time of Gobind Ram's death, and was in the habit of sitting daily at his uncle's place of business, he would have the means of knowing something about the persons employed in his uncle's firm, though he might not be minutely acquainted with their affairs, and their Lordships see no reason for discrediting his testimony. It tends to confirm the evidence of Hazari Lal, who values his father's estate at Rs. 40,000, and says that besides immovable property he had mortgages and monetary dealings which, after his death, were gradually realized in cash by his sons. Hazari Lal's evidence was disbelieved on some points by Banerji J., but, after making every allowance for exaggeration on his part, their Lordships cannot but come to the conclusion that Gobind Ram left considerable property both in land and securities for money.

This conclusion is supported by the circumstances of his family at and immediately after his death. It is conceded that he and his three sons constituted a joint Hindu family. When he died in 1849, his son, Durga Parshad, was about twenty years of age and a student at Bareilly College; Jwala Parshad was seventeen or eighteen years of age; and Hazari Lal ten or eleven. All three were maintained and educated at their father's expense. No one of them was in any employment until October, 1852, when Durga Parshad, then a first class student at the Bareilly College, was appointed officiating visitor of the Bareilly district, on a pay of Rs. 70 per month. For about three years, therefore, the three brothers had been living on funds which they had not earned; and as they had also, in 1851, purchased the two estates of Fatehpur and Sagalpur, to which reference has already been made, for Rs. 1,605 and Rs. 1,550 respectively, it is tolerably clear that the money for these purchases must have been provided from funds left by their father. Abhairajpur was still

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more valuable, as in 1870 it was leased, together with Fatehpur and a fraction of Sagalpur, at a jumma of Rs. 1,300 per annum. There is evidence also that Gobind Ram had lands in Kunja and other villages; and it is certain that besides the dewankhana already mentioned he left several houses in Bareilly, which are still in possession of members of the family. There were also debts due to, and mortgages held by, him.

The property left by Gobind Ram, with its accretions, was held jointly by his three sons from the time of his death in 1849 until 1866. In that year a partition of the joint estate was made between the three brothers, add there is no suggestion that, at that time, any of them had any separate estate. The share then taken by Durga Parshad was undoubtedly ancestral property, as between him and his sons, who from the moment of their birth acquired an interest in it. And as after the partition he and his sons lived together as a joint Hindu family until the time of his death in 1894, it is clear that he had no right to dispose by will of, at all events, this part of his property.

But it was contended that any property acquired by Durga Parshad after the partition was acquired by him "without the aid of ancestral funds, and with his own separate earnings," and that he therefore had the right to dispose of it as self-acquired property. This argument derives support from the fact that, after entering the service of Government in 1852, Durga Parshad held various offices in the Education Department. In 1858 he was a head clerk in the English office, with a salary of Rs. 150 per month; in 1862 he was a head master on a salary of Rs. 200 per month; in 1866 he was appointed a junior inspector of schools on Rs. 300 per month, and eventually he became an inspector of schools on a salary of Rs. 750 per month. In 1885 he retired on a pension of Rs. 4,000 a year. During the latter years of his life, therefore, he was in a position to save a fair portion of his income. But what are the circumstances of the case? It is admitted that Durga Parshad and his sons lived together as a joint Hindu family, and it is established that there was a considerable nucleus of ancestral property in his hands after the partition. The onus was therefore on the respondent to prove that his subsequently acquired property was his separate

estate. How has the onus been discharged? The most reliable evidence on the point is that contained in the books of Lachmi Narain, a native banker of Bareilly, with whose firm Durga Parshad kept an account from 1866, the year of the partition, until 1884, when it was closed. These books were produced on behalf of the appellant, and the clerk who produced them said, "I knew Durga Parshad. He had an account with the firm. The income from villages and pay used to be deposited. There was but one account." So far as their Lordships are able to form an opinion, this appears to be a correct description, and it was not controverted by the learned counsel for the respondent. The entries shew that properties of considerable value were from time to time purchased by Durga Parshad, and that he did not in any way discriminate between the sources of his income, but blended them all in one general account. There is oral evidence, also, that his sons when they became of age to earn their own living, gave the pay which they received to their father, with whom they lived and by whom they were supported. This is strong evidence that there was but one common stock of the whole family, into which each voluntarily threw what he might otherwise have claimed as self-acquired; and that the property purchased by, or with the assistance of, the joint funds was joint property of the family, and not of any particular member of it.

In the last year of his life Durga Parshad became dissatisfied with the conduct of his two younger sons, and made and registered a will, dated April 3, 1893, by which, in effect, he divided the family property, which he treated as having been "exclusively acquired" by himself, in unequal shares between his three sons. By a subsequent will, dated December 11, 1893, which practically revoked the former will, and the execution of which is not now contested, he gave an allowance of Rs. 35 per month and a dwelling-house to each of his two younger sons, and left the whole of his remaining property to his eldest son, the present respondent. In this will no particulars of his property are given, but it purports to deal with "all the movable and immovable properties which will constitute my estate on my death and which are my self-acquired properties."

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In the view which their Lordships take of this case, there were no properties of Durga Parshad at the time of his death which, according to Hindu law, could be classified as self-acquired, and the will is therefore inoperative to defeat the claim of the younger sons to a share in the family estate. They will therefore humbly advise His Majesty that the appeal ought to be allowed and the judgment of the High Court reversed with costs, and that the decree of the Subordinate Judge of Bareilly, dated March 30, 1898, ought to be confirmed. The respondent must pay the costs of this appeal.

Solicitors for appellants : *T. C. Summerhays & Son.*

Solicitors for respondent : *Barrow, Rogers & Nevill.*

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DEPUTY COMMISSIONER OF KHERI (MANAGER, COURT OF WARDS, OEL ESTATE). } DEFENDANT :

AND

KHANJAN SINGH AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Civil Procedure Code, s. 13—*Res judicata—Hindu Widow's Alienation—Justifying Necessity.*

In a suit by reversionary heirs in effect to set aside a sale by a Hindu widow of her husband's estate it appeared that the purchaser was a decree-holder against the husband, and that the consideration relied upon was—(1.) the amount decreed; (2.) interest thereon under a decretal order operative at the time of sale, but subsequently reversed; (3.) a further cash payment :—

Held, that the decree-holder and those claiming under him could not plead justifying necessity in respect of the second item ; and, as the third was not proved, the sale must be set aside, with mesne profits from the date of the widow's death, the first item being allowed in deduction therefrom.

Held, further, that the dismissal of the plaintiffs' suit in the lifetime of the widow against the predecessor of the defendants for pre-emption in respect of her widow's interest, did not operate as res judicata under

* *Present* : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

s. 13, Civil Procedure Code, in the defendants' favour. No question as to the effect of the widow's conveyance on the reversion could have been raised therein.

APPEAL from the above Court (May 29, 1903), affirming a decree of the Subordinate Judge of Sitapur.

The suit was brought in 1899 by Ajudhia Singh, afterwards represented by his sons, and Khanjan Singh, as heirs of Kalka Bakhsh, for possession with mesne profits of the property in suit.

The material allegations in the plaint were that Kalka Bakhsh was the last male owner of the property in dispute, and that, some time prior to 1868, he died, leaving a widow named Man Kunwar, who got possession of his estate; that on December 22, 1868, Man Kunwar and her husband's mother, named Shiam Kunwar, executed a sale deed of the villages in suit in favour of Raja Anrudh Singh, the consideration for which was—

(*a*) Rs. 12,718-5-9 principal and interest on account of a fourth share out of the amount due under a decree dated July 12, 1861;

(*b*) Rs. 7,280 in cash.

Man Kunwar died on May 31, 1894, and thereupon plaintiff No. 1, as the nearest reversioner of her husband, and plaintiff No. 2, who lived with him as members of a joint Hindu family, became the proprietors and entitled to possession of the villages in suit.

It was also alleged that on the death of Raja Anrudh Singh the property in dispute came into the possession of his heir, and was placed under the management of the Court of Wards, and on August 26, 1898, the Court of Wards sold all the villages in suit (with one exception, Majhgawan) to Jowahir Singh, the second defendant, who obtained possession of them.

The defendants pleaded (inter alia) that in December, 1869, the said Ajudhia Singh and others filed a suit for pre-emption against Raja Anrudh Singh in respect of the property now in suit; that they did not then dispute the validity of the sale deed dated December 22, 1868, and were therefore now estopped from denying its validity, both under s. 115 of Act I. of 1872 and s. 13 of the Civil Procedure Code.

The Courts below decreed in favour of the plaintiffs. They decided that there was no estoppel in consequence of the said

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suit for pre-emption, and that the suit was not barred by limitation, the cause of action having arisen on the death of Man Kunwar. On the merits as to whether the said sale was binding on the reversioners or not, they decided—first, as to the sum of Rs. 7,280 alleged to have been paid in cash, that this amount was not paid in fact, much less that it was borrowed for any legal necessity; secondly, as to interest on the amount of the decree dated July 12, 1861, that no interest was payable thereunder; thirdly, as to principal amount, viz., Rs. 7,080-3-0 due by Kalka Bakhsh under the decree, that Man Kunwar was under a legal obligation to pay this debt, even though barred by limitation. They also decided that Jowahir Singh was not a bona fide purchaser for value without notice of the plaintiffs' claim; and that, even if he were, he had no better title than Raja Anrudh Singh. In the result they decided that the plaintiffs were entitled to possession of the villages in suit, together with mesne profits, subject to a liability to pay Rs. 7,080; and, as the amount of the mesne profits exceeded the said sum, they set off the one amount against the other, and made a decree for possession of the said villages and the payment of the balance of the mesne profits only.

Cohen, *K.C.*, and *Ross*, for the appellant, contended that the respondents had failed to prove that they were the nearest reversioners in respect of Kalka Bakhsh's estate, and consequently were not entitled to sue: see Mayne's Hindu Law, 7th ed. p. 871, ss. 646, 647; 6th ed. p. 847. The interest allowed to Raja Anrudh Singh was part of the consideration for the sale deed, inasmuch as it was due and claimable at the time of its execution. The sale was accepted and admitted in the suit for pre-emption, and therefore the respondents, having once affirmed it, were now estopped from disputing its validity on the ground of absence of necessity, and it was unnecessary for the appellant to prove the existence of debts and the alleged necessity. The sale was not void, but at most voidable until affirmed. Reference was made to *Isri Dutt Koer* v. *Hansbutti Koerain* (1); *Raja Modhu Sudan Singh* v. *Rooke*. (2) It was also contended that the decision in the pre-emption suit was res judicata as to the

(1) (1883) L. R. 10 Ind. Ap. 150. (2) (1897) L. R. 24 Ind. Ap. 164.

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validity of the sale under s. 13 of the Civil Procedure Code, since its invalidity could have been raised and decided therein.

De Gruyther, for the respondents other than the purchaser, contended that there were concurrent findings that Ajodhia Singh was next heir to Kalka Bakhsh at the death of his widow, and as such entitled to sue; also that there was no legal necessity for the sale of December, 1868. The decision in the suit for pre-emption created no estoppel, for it related to a different issue, to which any contention as to the title to the estate after the widow's death would have been irrelevant.

Cohen, K.C., replied.

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The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The case out of which this appeal arises relates to an alienation by a Hindu widow of property which had belonged to her husband.

The properties in dispute formed a part of the estate of Kalka Bakhsh, who died in or before 1868, without male issue, leaving as his heir his widow Man Kunwar, who took as such heir the estate of a Hindu widow.

During the lifetime of Kalka Bakhsh, on July 12, 1861, a decree based upon a mortgage was passed against Kalka Bakhsh and others, in favour of Raja Anrudh Singh, for a sum of Rs. 28,320-12, principal and interest, payable in two instalments, interest subsequent to the decree being disallowed. Kalka Bakhsh's share of liability under this decree became ascertained at Rs. 7,080.

Proceedings were subsequently taken to execute the decree, and on October 22, 1866, the then Deputy Commissioner of Kheri, before whom the execution was in progress, made a decree or order allowing in favour of the judgment creditor, what the decree had not given him, interest subsequent to decree at the rate of 2 per cent. per mensem from the due dates of the several instalments. But after some intermediate proceedings, on September 15, 1869, that decree or order was set aside by the Court of the Judicial Commissioner of Oudh, on the ground that the Court executing a decree has no power to alter or add to it.

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In the interval between the making of the decree or order of October 22, 1866, and its reversal on September 15, 1869, the sale deed now in question was executed. It was dated December 22, 1868. It was executed by the widow Man Kunwar and by her late husband's mother. It was in favour of the same Raja Anrudh Singh, who had obtained the decree of July 12, 1861. The consideration alleged was made up of three parts—first, the Rs. 7,080 due under the decree of July 12, 1861 ; secondly, interest on that sum subsequent to the date of the decree ; thirdly, a fresh advance said to have been made in cash of Rs. 7,280.

Man Kunwar died on May 31, 1894, whereupon the estate of her husband passed to his then next male heir, Ajudhia Singh. And on February 21, 1899, Ajudhia Singh (with another who need not be further noticed) instituted the present suit in the Court of the Subordinate Judge of Sitapur. The defendants were, first, the Deputy Commissioner of Kheri, as Manager for the Court of Wards in charge of the estate which had been that of Raja Anrudh Singh ; and, secondly, Thakur Jawahir Singh, a purchaser from the Court of Wards of the greater part of the property in dispute. The claim was to recover the property as from the death of Man Kunwar with mesne profits.

Various defences to the suit were raised, but only two were urged on the argument of the appeal before their Lordships—first, that the sale in question was justified by necessity, and on this ground was effectual to pass the whole interest of Man Kunwar's husband in the property, not merely her widow's estate; secondly, that the suit was barred by s. 13, Explanation II., of the Civil Procedure Code.

The Subordinate Judge made a decree in favour of the plaintiffs for possession and mesne profits. He allowed the defendants credit in account for Rs. 7,080, the amount due under the decree of July 12, 1861, but disallowed the other two portions of the alleged consideration for the sale. He decided against the defendants with regard to the suggested bar by s. 13 of the Civil Procedure Code. The Judicial Commissioners of Oudh, on appeal, agreed with the Subordinate Judge and affirmed his

decree. That is the decision now appealed against by the first defendant, the Deputy Commissioner of Kheri.

With regard, in the first place, to the defence of necessity, it is not disputed that such necessity existed in respect of the first item of consideration, Rs. 7,080, the amount due under the decree of July 12, 1861, and for this amount the appellant has received credit. As to the third item of consideration, the alleged fresh advance of Rs. 7,280, both Courts in India have found that there was no evidence of necessity for such an advance, if it ever was made; and their Lordships agree.

The argument really turned upon the second item, the interest after decree upon the decree of July 12, 1861. The contention was that, inasmuch as the decree or order of October 22, 1866, granting interest on the amount decreed in 1861 was in force when the conveyance in question was executed, the doctrine of necessity extended to the interest.

It is not necessary to inquire what the result would have been if some outsider had advanced money to the widow in order to protect the estate against a claim by Raja Anrudh Singh to realize the interest awarded to him by the decree or order of October 22, 1866. The question that does arise is, whether those who claim under the Raja, and whose position is no higher than his, are entitled to base a claim to the property in question upon a decree or order, originally made in the Raja's favour, but subsequently set aside. Their Lordships agree with the Courts in India that the claim of the appellant on this ground cannot be supported.

The contention based upon s. 13 of the Civil Procedure Code arises out of the following circumstances. After the sale by Man Kunwar to Raja Anrudh Singh, Ajudhia Singh, on December 23, 1869, brought a suit against the Raja and others, in which the plaintiff claimed a right of pre-emption. The suit was dismissed on the ground that no right of pre-emption was proved. It is now contended that the ground of claim in the present suit is a matter which might and ought to have been made a ground of attack in that suit.

Their Lordships agree with the Courts in India in thinking that what was in question in that former suit was the right of

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pre-emption in respect of what Man Kunwar had power to convey and did convey, that is, her widow's interest, and that the introduction of any question as to the effect of the conveyance upon the reversion would have been incongruous to the matter of the suit.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitor for appellant : *Solicitor, India Office.*

Solicitors for respndents : *T. L. Wilson & Co.*

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PRAYAGA DOSS JEE VARU. . . . . DEFENDANT;

AND

TIRUMALA ANANDAM PILLAI PURISA SRIRANGA CHARYLU VARU AND ANOTHER. } PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Management of Hindu Temple—Protection of its Funds—Scheme of the High Court settled.

Case in which their Lordships finally settled a scheme for the management of a Hindu devastanam, or temple, and for the protection of its funds in view of objections to the scheme of the High Court by the parties most concerned, which objections related to the authority of the mahant and the application of surplus revenue.

APPEAL from a decree of the High Court (February 10, 1905), modifying a decree of the District Court of South Arcot (November 7, 1901).

The litigation out of which this appeal arose was concerned with a large number of devastanams, or temples, situate at Tirupati. These temples are of very remote antiquity, of great importance, and held in great veneration by Hindus in all parts of India. The original constitution of the temples as a religious trust did not appear, and they are chiefly maintained by the voluntary offerings of pilgrims. On the assumption of British

*Present : LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

rule in the Carnatic, the Government took over their management. Later, on the passing of Madras Regulation VII. of 1817, they were managed by the Collector of the district, subject to the control and superintendence of the Board of Revenue. This state of things continued till the year 1841. On June 24 of that year the Governor of Madras, acting under the instructions of the Court of Directors of the East India Company, issued orders for the immediate withdrawal from all interference with native temples and places of religious resort. He stated that it was the intention of Government that the interference of all public officers, either with the internal arrangements of the religious institutions in question, or with the administration of their revenues and funds of every description, should be altogether withdrawn, and be vested in those individuals who, professing the same faith, might be thought best qualified to conduct that administration with fidelity and regularity. Such individuals, together with their subordinate officers, he added, were to be responsible to the Courts of justice for any breach of their duties and trusts assumed by them, and this withdrawal was not to be partial and uncertain, but final and complete. In pursuance of this order the Board of Revenue, on July 6, 1841, directed the Collectors of districts to report in detail the arrangements proposed for each institution in their districts.

Reports were furnished in regard to the temples in suit. The arrangement finally sanctioned was evidenced by a sanad granted on July 10, 1843. It appointed Sri Seva Doss Ji Varu, the mahant of the Mutt of Sri Hathiramji, to be the vicharanakartha (i.e., trustee and manager) of the said temples, and directed that he should perform or cause to be performed, all the religious services, festivals, and duties usually performed at the said temples; that he should receive all the offerings and save the surplus income, if any, maintain the hereditary subordinate officials in their offices, and keep proper accounts. Provision was also made for a perpetual succession to the office of vicharanakartha, by directing that the successor to the said Seva Doss in the said mutt should also succeed him as trustee.

Seva Doss was placed in possession of the said temples, and continued to act as trustee till his death in the year 1864. He

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was succeeded by Dharma Doss, and on his death in the year 1880 Bhagawan Doss succeeded him, and in January, 1890, appointed Mahabir Doss as his successor. Mahabir Doss died on October 11, 1894, and, after an interregnum, Ramkishore Doss, the original defendant to this suit, succeeded to the office on March 17, 1895. Pending judgment in the District Court he was murdered on September 15, 1900, and was succeeded by the appellant Prayaga Doss.

This suit was brought in 1898, with the consent of the Advocate-General of Madras, under s. 539 of the Civil Procedure Code, against Ramkishore Doss by the respondents, two subordinate officials attached to the temples. The plaint referred to the management of the temples by the Government, and the grant of the sanad dated July 10, 1843. It alleged that each of the trustees in succession had been guilty of malversation and misappropriation of the trust funds, and specifically charged the defendant with the improper use of his powers; with failure to perform regular religious ceremonials; with neglect to keep proper accounts; with misappropriation of offerings; and with other acts of a similar nature. The relief sought was, "The settling a scheme for the management of the plaint devasthanams, with such modifications in the organization of the managing authorities as may be necessary to obviate the evils referred to above, and to place the administration of the devasthanams on a satisfactory footing."

In his written statement Ramkishore Doss denied each and every charge made against him, and pleaded that the suit was not maintainable under s. 539 of the Code of Civil Procedure, as also that under the said section the Court had no power to alter the constitution of the trust when framing a scheme of management.

The District Court made a decree framing a scheme of management intended to remedy existing abuses. The Mahant of Hathiramji Mutt was retained as a trustee, and a committee of control consisting of five persons was appointed to supervise his proceedings.

Both plaintiffs and defendant appealed, and the High Court rejected the scheme of the District Court and substituted

another. It said in its judgment that it was clear "that the arrangement made in 1843 for the administration of the institution has not answered the expectations then entertained, that the mahants have shewn themselves to be utterly incompetent to discharge the duties of the office properly, and that the surplus income has been misappropriated by them partly for their own personal use and partly for the aggrandisement of the mutt. Unless, therefore, steps are taken to impart real efficiency to the management, to provide checks against peculation and to arrange for the due application of surplus funds not required for the usual and ordinary purposes of the institution, it is impossible to safeguard the interests of the institution. We agree, therefore, with the District Judge that this is a fit case for the Court sanctioning such a scheme. And it may be added that Sir V. Bashyam Aiyangar, who appeared for the mahant both in the lower Court and here, did not take any objection to a scheme being sanctioned. The controversy has been as to the machinery which the District Judge considered necessary to bring into existence in the form of a committee consisting of five members who were to exercise minute and complete control over the mahant. And it was contended both before him and before us that it was beyond the jurisdiction of the Courts to establish such a controlling authority. And it was also strongly urged that it was not competent, in cases like the present, for the Courts to appoint new or additional trustees." In discussing the actual terms of the scheme to be sanctioned the learned judges expressed the view that the decree appealed against created a machinery which was too cumbrous to work smoothly and effectually; and in substitution for that decree they decided to settle a scheme by which an additional trustee should be appointed to take part in the management with the mahant instead of a committee, and that he should be remunerated at a sum not less than Rs. 400 and not more than Rs. 500 per mensem, and that the term of office of the additional trustee should extend to five years, and that he should be eligible for re-appointment; and that in the case of difference of opinion arising between the two trustees the matter should be referred to the Pedda Jeyangar, whose opinion should be followed. Either of the trustees should be liable to summary removal by

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the District Court on good cause shewn, subject to appeal to the High Court. The judgment goes on as follows : "In addition to the matter of the appointment of such new trustee the scheme should first and foremost provide for the utilization of the surplus funds coming into the hands of the trustees from time to time. The necessity for making such a provision is imperative to guard against the wasting or embezzlement of such accumulations in future, which have been not only possible in the past, but encouraged owing to the want of any provision for their utilization. There is no complaint that the services in the temple have not been duly performed, but after all that has been done, the mahant has found a large surplus in his hands which the accounts shew he has expended upon objects more or less objectionable. The surplus income may be estimated at about a lakh or so per annum. Proceeding on the cy-pres principle the following are the objects on which both sides are agreed that the surplus funds may be appropriately spent." The objects referred to are as follows : The establishment of a college in Lower Tirupati for the promotion among Hindus of a knowledge of the Hindu religion and shastras. The foundation and maintenance of a rest-house and hospital on the Tirumalai hill for the use and accommodation of pilgrims and worshippers. The introduction of a good water-supply, and the improvement of road communications on the hill.

Sir R. Finlay, K.C., De Gruyther, and *Le Fanu*, for the appellant, contended that under s. 539 of the Civil Procedure Code the High Court had no power to alter the constitution of the trust by the appointment of an additional trustee. The power to appoint a committee of control over trustees of religious institutions is limited to cases under s. 3 of Act XX. of 1863, which did not apply to this trust. The scheme as framed appointing the Pedda Jeyangar as umpire in case of dispute between the trustees is not only illegal, but unworkable in practice. So also the provision made for summary removal and the appointment of an additional and paid trustee : see ss. 14 and 18 of Act XX. of 1863. Such alteration tended to impair the dignity and authority of the mahant, which were derived from the Government sanad

granted in 1843 to Seva Doss and his successors. The High Court had no material before it on which a finding could be based that there were surplus funds in the hands of the trustee which could not be applied to the legitimate objects of the present trust. There was no allegation in the plaint that, after provision is made for the due performance of the religious ceremonies and duties incumbent to be performed under the trust, there is any surplus, as assumed by the High Court. Even if such surplus existed it was contended that the objects specified in the scheme of the High Court were not of a nature kindred to the purely religious objects for which the trust in suit was founded.

The respondents did not appear.

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The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The suit which has given rise to this appeal was brought for the purpose of having a scheme settled for the management of a Hindu devastanam, or temple, situated in Tirupati, and the protection of its funds.

It was not disputed in either of the Courts below that a scheme was necessary. The questions in debate were confined to matters of detail.

The state of things which made a scheme necessary and the earlier history of the institution are summed up in the following passage taken from the judgment of the High Court :—

"The temple of Sri Venkateswara in Tirumalai or Tirupati in the North Arcot district is a very ancient Hindu temple to which worshippers resort from all parts of India, and is in receipt of an annual income of between two and three lakhs of rupees. Prior to the establishment of the British Government, the management of the institution was directly under the ruler of the country for the time being. After the advent of the British, the management passed into the hands of the East India Company, and subsequent to the enactment of Regulation VII. of 1817 of the Madras Code, it was carried on under the control of the Board of Revenue through the Collector of the district. With reference to a despatch of the year 1841 from the Court of Directors ordering the immediate withdrawal from

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all interference on the part of the officers of Government with native temples and places of religious resort, the management of the temple was in 1843 made over to Seva Doss, the head of a mutt called Hathiramji Mutt, situated in the town of Tirupati at the base of the hill on which the important shrine stands. In the 'sanad' by which this transfer of management was effected, it was provided that Seva Doss' successors in the mutt should be his successors as vicharanakartha or manager of the temple. Seva Doss having died in 1864, Darma Doss succeeded him, and on Darma Doss' death in 1880, Bagavan Doss became manager and continued so till 1890. From 1890 to 1894 Mahbir Doss was manager. And from 1895 to 1900 Ramakisore Doss, the defendant in the two suits Nos. 31 of 1898 and 10 of 1899, on the file of the North Arcot District Court, held the management ; and on his death, pending the litigation, the present mahant, as the head of the mutt is styled, succeeded to the office of the manager, and was brought on the record as the legal representative of Ramakisore.

"Now, when in 1843 the management was transferred to Seva Doss, it was, no doubt, expected that the management by the mahant would prove satisfactory, but the history of what took place subsequent to Seva Doss' death is, to put it shortly, a record of waste and embezzlement."

In these circumstances the District Court settled a scheme. The scheme was amended by the High Court on appeal. As amended it was still not satisfactory to the parties most concerned, and the mahant appealed to His Majesty in Council. The principal objections urged on the appeal were—(1.) that the effect of the scheme would be to lower the position of the mahant and weaken his authority ; and (2.) that, although there was no surplus in hand nor any immediate prospect of a surplus, the scheme provided for the application of surplus revenue, devoting it to objects admirable perhaps in themselves, but somewhat foreign to the purposes of the institution. It was pointed out that these provisions were unnecessary at present and likely to prove embarrassing in the future.

The appeal to this Board was heard ex parte. But their Lordships had the benefit of Sir Robert Finlay's official experience

in similar matters in this country. After a full discussion in Court their Lordships, with the assistance of the learned counsel engaged, have settled the following scheme, which will, they think, meet the exigencies of the case without impairing the authority of the mahant as the duly constituted manager of the institution.

Scheme.

1. A treasurer to be appointed by the District Court at a salary.

2. All funds to be in the custody of the treasurer. Rules to be framed by the District Court to ensure the proper receipt and custody of all offerings, income and funds, and investment of any surplus, and to prevent misappropriation, and to ensure the proper management of any estates or other properties or investments.

3. The vicharanakartha, two months prior to the commencement of every year, to prepare and file in the District Court a budget of the expenses to be incurred in the ensuing year.

4. The treasurer to put the vicharanakartha in funds for all disbursements according to the budget, and for any further expenditure deemed necessary by the vicharanakartha, but unless by leave of the District Court such further expenditure not to exceed Rs. 5,000 during any one year.

5. The vicharanakartha, within three months after the end of each year, to cause to be prepared and filed in the District Court a detailed account of receipts and disbursements of the year. The accounts to be audited by an auditor to be appointed by the District Court. The remuneration of the auditor to be fixed by the District Court and paid from the devastanam funds. An abstract of the said accounts prepared and certified by the auditor to be published in such manner as the District Court shall direct.

6. All surplus income to be invested for the benefit of the temple.

7. No immovable property of the temple, including lands held on mortgage, lease, or any other right, to be given on lease for more than five years, mortgaged or sold by the vicharanakartha, except with the sanction of the District Court.

8. No jewels or other property of value to be sold without the sanction of the District Court.

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9. Subject to this scheme the vicharanakartha's position to remain as before.

10. Liberty for the vicharanakartha and any person interested to apply to the District Court with reference to the carrying out of the directions of this scheme.

11. Liberty for the vicharanakartha and any person interested from time to time to apply to the High Court for any modification of this scheme that may appear to be necessary or convenient.

Their Lordships will therefore humbly advise His Majesty that an order be made to the following effect :—

Discharge the orders of the High Court and the District Court ;

Approve the foregoing scheme as a proper scheme for the management of the devastanam.

Refer it to the District Court to appoint a treasurer to frame such rules as are required under the said scheme to be framed by them (with power to vary the same from time to time), and also to fix the date when the scheme is to come into operation.

The costs of all parties of this suit, including the charges and expenses of the vicharanakartha properly incurred, the costs of the appeal to the High Court, and the costs of the appeal to His Majesty in Council, to be submitted to the District Court and as approved by the Court to be paid and retained out of the funds of the devastanam.

Solicitors for appellant : *Lawford, Waterhouse & Lawford.*

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SRIMATI KRISHNA MAHISHI DEBI AND OTHERS . . . . . } DEFENDANTS. *Dec.* 17, 18.

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ON APPEAL FROM THE HIGH COURT IN BENGAL. *Feb.* 7.

Limitation Act, 1877, *Sched. II., arts.* 144 *and* 91—*Unauthorized Lease by Hindu Widow—Suit for Possession after her Death—Lease may be treated as a Nullity.*

In a suit for a declaration that an ijara granted by a Hindu widow of her husband's estate had become inoperative as against the plaintiffs (heirs of her husband) since her death, and for khas possession of the properties in suit with mesne profits :—

Held, that art. 144, and not art. 91, of Act XV. of 1877, Sched. II., applied to the suit, which was substantially one for possession. There was no necessity for the declaration prayed, or to cancel or set aside the ijara, which the plaintiffs were, after the widow's death, entitled to treat as a nullity.

Their Lordships, while regretting the introduction of irrelevant papers into the record, ruled that as the respondents were not shewn to have objected, the appellants could not be deprived of their costs.

APPEAL from five decrees of the High Court (June 16, 1903), whereby a decree of the Subordinate Judge of Nuddea (November 28, 1898) was reversed so far as it granted any relief to the appellants, and their suit was dismissed with costs.

The questions decided in this appeal were whether the suit was barred by limitation.

The Subordinate Judge found that under the circumstances stated in their Lordships' judgment there was no necessity for the widow granting the ijara in question, and held that the suit was governed by Act XV. of 1877, Sched. II., arts. 140 and 141, which provide twelve years' limitation, and not by art. 91, which provides three years for a suit to cancel or set aside an instrument of the description in suit, calculated from the time when the facts entitling the plaintiff thereto became known to him.

The High Court held that, whether there was necessity for the

* *Present* : LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD ATKINSON

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ijara or not, it was at best only voidable, and that a suit to avoid it was, under the circumstances, barred by not having been brought within three years from the widow's death. Its judgment on this point was as follows :—

"In the present case it may be remembered that the defences of legal necessity and of election to treat the lease as valid, if substantiated, would shew that the lease could not be treated as ipso facto void. The plaintiffs evidently treat the lease as one that must be avoided by being set aside; and the question before us appears to resolve itself into this, whether they could obtain khas possession without having the lease set aside. If they could not, art. 91, and not art. 141, would seem to govern the case."

After holding that the lease must be set aside before the plaintiffs could recover possession, the judgment proceeded :—

"It is contended, however, for the plaintiffs that art. 91 cannot apply, because the time from which the period begins to run is, when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to them. It has not been disputed that these facts were known to them on the death of the widow : and probably long before, for the father (Annoda) of five of the reversioners, was himself one of the ijaradars, and his ijara interest passed under his will. But it is said that these facts might have become known to them during the life of the widow, in which case they would have had to bring their suit during her lifetime. If well founded, I scarcely see how this argument would assist the plaintiffs : it would only mean that they were not necessarily entitled to three years from the death of the widow; but the argument does not appear to me to be sound, because the lease was perfectly good during the widow's life, and the reversioners did not become entitled to have the instrument set aside until after her death, and her death is one of the elements which entitle them to have it set aside. In the case suggested, the plaintiffs might have proceeded under art. 125, which does not appear to clash, as has been suggested, with the view we take as to the applicability of art. 91. If a reversioner desire to set aside a deed executed by a Hindu widow, which is voidable as against him, the Legislature may well have thought that it was desirable that such suits should be brought within a

much shorter period than that prescribed for the recovery of immovable property in ordinary cases."

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De Gruyther, for the appellants, contended that art. 91 only applied where it was necessary to set aside some instrument before the property to which it related could be recovered. It was unnecessary for the plaintiffs to set aside this ijara. It came to an end and ceased to be operative at the death of the widow, at which date the appellants became entitled as next heirs to the last full owner. Art. 141 was the applicable provision to a suit for possession such as this. Reference was made to *Thakur Tirbhuwan Bahadur Singh* v. *Rameshar Baksh Singh* (1); *Janki Kunwar* v. *Ajit Singh* (2); *Modhu Sudan Singh* v. *Rooke*. (3)

Levett, K.C., and *W. Saunderson*, for some of the respondents, contended that on the death of the widow the ijara was only voidable, and not void. To avoid it the appellants were bound to sue for that purpose and to obtain a decree to set it aside. To that suit, which was an indispensable preliminary to the present suit, art. 91 applied, and the present suit was barred by the same provision. The appellants had to shew, not merely that the lease was voidable, but that they had a right to avoid it, which could not be established without adjudication upon the points whether there was legal necessity for the ijara, whether it had been assented to by the nearest reversioners for the time being, whether it had been subsequently ratified and confirmed by themselves. Reference was made to *Modhu Sudan Singh* v. *Rooke* (3); *Sadai Naik* v. *Serai Naik* (4); *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (5); *Indar Kuar* v. *Lalta Prasad Singh* (6); *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (7); *Hem Chunder Sanyal* v. *Sarnamoyi Debi*. (8)

Counsel for appellant was not heard in reply.

The judgment of their Lordships was delivered by

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Feb. 7.

LORD DAVEY. The only question on this appeal is whether the suit out of which it arises is barred by limitation. The appellants

(1) (1906) L. R. 33 Ind. Ap. 156.
(2) (1887) L. R. 14 Ind. Ap. 148.
(3) (1897) L. R. 24 Ind. Ap. 164.
(4) (1901) I. L. R. 28 Calc. 532.
(5) (1861) 8 Moo. Ind. Ap. 529, 550.
(6) (1882) I. L. R. 4 Allah. 532.
(7) (1884) I. L. R. 10 Calc. 1102.
(8) (1894) I. L. R. 22 Calc. 354.

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(plaintiffs in the suit) are four of the reversionary heirs of one Chandra Bhusan Mukerji, who died childless so long ago as the year 1832. He was succeeded by his widow, Soyamoni Debi, who died on October 21, 1893. The principal defendants to the suit, or their successors in title, being respondents 1 to 68, are in possession of the property in suit, and claim to be entitled thereto either directly or by derivative titles under an ijara, or lease, of the whole of Chandra Bhusan's property for a term of sixty years, executed by Soyamoni on September 7, 1863. The other defendants, or their successors in title, being the last three respondents are the other reversionary heirs, who have not joined the appellants as plaintiffs. By their plaint the appellants prayed a declaration that the ijara in question, and all the rights subordinate thereto mentioned in the plaint, have become inoperative as against the appellants since Soyamoni's death, and for khas possession of the disputed properties with mesne profits.

The Subordinate Judge, on the trial of certain preliminary issues, held, on the authority of *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (1), that art. 91 of Sched. II. to the Indian Limitation Act had no application to the present suit, and that it was governed by the twelve years' limitation prescribed by arts. 140 and 141. No limitation therefore applied to the suit, and he found the issue as to limitation in the appellants' favour. At the subsequent trial of the other issues on their merits, the Subordinate Judge's judgment was in favour of the appellants, except as to certain defendants, and he made a decree, dated November 28, 1898, in accordance with his findings.

No less than six appeals against the decree of the Subordinate Judge were presented to the High Court of Calcutta, and on the hearing of the appeals the Court reversed the finding of the Subordinate Judge on the preliminary point as to limitation, holding that art. 91 was applicable to the case, and that consequently the suit was barred, and must be dismissed with costs.

By art. 91 of Sched. II. to the Limitation Act the period of limitation for a suit "to cancel or set aside an instrument not otherwise provided for" is "three years from the time when the facts entitling the plaintiff to have the instrument cancelled or

(1) (1896) I. L. R. 24 Calc. 77.

set aside become known to him." By art. 141 it is prescribed that, in a suit for possession of immovable property on the death of a Hindu female, the period of limitation is twelve years from the female's death.

The learned Chief Justice in his judgment observes that the Court had first to consider whether the lease in question was void or voidable, and that this was set at rest by this Board in the case of *Modhu Sudan Singh* v. *Rooke.* (1) The learned judge quoted from the judgment delivered by Sir Richard Couch the following words: "In considering their effect it must be observed that the putni was not void, it was only voidable; the raja might elect to assent to it and treat it as valid. Its validity depended on the circumstances in which it was made. The learned judges of the High Court appear to have fallen into the error of treating the putni as if it absolutely came to an end at the death of the widow."

The Chief Justice subsequently observes (not with perfect accuracy) that in the case before the Court the plaintiffs expressly asked to have the ijara lease set aside, and cannot recover possession unless it is set aside. From the authorities which had been cited by him, he says, it would appear that if the plaintiffs can recover possession without setting aside the lease, then art. 141 would apply and not art. 91, but if they cannot so succeed without getting rid of the lease, then the case would fall within art. 91.

Their Lordships think that the learned Chief Justice correctly stated the question in the words last quoted. But they differ from the learned judge as to the answer to be given to the question so put, and they think that it is not answered by merely saying that the ijara was voidable only and not void. In the case before this Board cited by the learned judge the question was whether the acceptance of rent payable under the putni and other circumstances afforded evidence of an election by the raja to confirm the putni and treat it as valid. If it was ipso facto void it could not of course be confirmed, and the acceptance of rent would be evidence only of the creation of a new tenancy. A Hindu widow is not a tenant for life, but is owner of her husband's

(1) L. R. 24 Ind. App. 164.

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property subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shews his election to do the latter by commencing an action to recover possession of the property. There is, in fact, nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for shewing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs.

Their Lordships are of opinion that the article in the schedule to the Limitation Act applicable to this case is art. 141, and the suit is not therefore barred, and that it should therefore be sent back to the High Court to inquire into and decide the other points mentioned by counsel for the respondents.

The High Court made altogether five decrees, all dated June 16, 1903, on the appeals before it. In appeal No. 71 of 1899, by the present appellants, the appeal was dismissed with costs except as to defendants respondents Nos. 18 to 24, both inclusive, who had entered into a compromise and had obtained a decree to that effect on June 2, 1903. By the other four decrees the suit was dismissed with costs. The sixth appeal, No. 175, by defendant No. 5, is also stated to have been compromised.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court, dated June 16, 1903, in appeal No. 71 of 1899, be reversed except as to defendants respondents Nos. 18 to 24, both inclusive, therein mentioned, and that the four other decrees of the High Court of the same date also be reversed, and the finding of the Subordinate Judge on the third issue as to

limitation be affirmed, and with this direction the cause be remitted to the High Court to proceed with the consideration of the appeals to that Court from the decree of the Subordinate Judge dated November 28, 1898, other than such as have been compromised. The respondents other than those with whom compromises have been made as aforesaid, and respondent No. 59, who is dead, and whose representative is not a party to the record, and except such as are pro forma defendants only, will pay the costs of this appeal.

Their Lordships must again express their regret at the bulk of the papers included in the record, which are for the most part absolutely irrelevant to the only question raised by the appeal. As, however, there is nothing in the record to shew that the respondents objected to the inclusion of any of these papers, their Lordships cannot deprive the appellants of any part of their costs.

Solicitors for appellant : *Sanderson, Adkin, Lee & Eddis.*

Solicitors for some respondents : *Downer & Johnson.*

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SADAGOPA CHARIAR AND OTHERS . . . PLAINTIFFS;

AND

A. RAMA RAO AND OTHERS . . . . . DEFENDANTS.

J. C.*

1907

Feb. 15 ; *March* 21.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Public Worship of Idols, and Processions in Streets—Suit for Injunction—Res judicata—Madras Act V. of 1884.

In a suit by one sect of Vaishnava Brahmins against another to declare the right of the former to prohibit public worship in a certain ryotwari village of the idol of the latter and processions in its honour, and for an injunction, the plaintiffs alleged that they were originally the owners of all the land in the village, and only allowed houses to be built and streets formed subject to the reservation that no worship or procession of the defendants' idol should be permitted :—

Held, that the suit was rightly dismissed. There was no evidence of

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* *Present* : LORD MACNAGHTEN, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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proprietary right as alleged, and all parties had equal rights in the public streets, which had been vested in a local board under Madras Act V. of 1884, without objection from the plaintiffs.

A decree in a suit brought in 1828 against certain members of the defendants' sect could not be relied upon as res judicata, for it was not a representative suit but merely ordered the defendants individually to discontinue their worship and processions, and did not, and could not, bind property or the defendants' sect for all time.

APPEAL by special leave from a decree of the High Court (August 21, 1902), affirming a decree of the District Judge of South Arcot (October 23, 1900), which dismissed the appellants' suit with costs.

The suit was brought, under the circumstances stated in the judgment of their Lordships, for a declaration that the Vadagalai inhabitants of Tiruvendipuram are entitled to the right that no public worship or procession of Manavala Mahamuni or any other Tengalai idol shall take place in any of the streets of Tiruvendipuram, and consequent injunction. They alleged that a suit brought in 1828 by some Vadagalais, some of whom were ancestors of the plaintiffs, against the Tengalais for a similar injunction was followed by a decree dated October 12, 1840, which established their right practically as claimed by their present suit, and had the force of res judicata.

The District Judge observed: "Briefly plaintiffs' claim may be summarized thus—

"(*a*) The Vadagalai community has the absolute ownership of the village site of Tiruvendipuram.

"(*b*) If this is not proved it has, by special custom, a right to prevent the public worship of any antagonistic deity within the limits of the village site, including procession in streets.

"(*c*) Under the judgment (October 12, 1840) the dispute is irrevocably decided, at all events in so far as the deity Mahamuni is concerned."

With regard to (*a*), the learned judge decided that the Vadagalai community had failed to prove that they had the absolute ownership of the village site.

With regard to (*b*), he held that the facts proved by the plaintiffs did not establish such a custom as the law, as it is now interpreted, would enforce.

With regard to (c), he ruled that there was not that identity of parties and reliefs necessary to make the judgment dated October 12, 1840, operate as res judicata in the present suit.

The High Court (see I. L. R. 26 Madr. 376) agreed with the District Judge that the appellants had not proved that the Vadagalais were the original owners of the village; that the custom set up was not reasonable nor valid in law; and that the matter was not res judicata. They said that a complete resume of the dispute was given in *Sadagopachari* v. *Krishnamachari*. (1) With regard to the custom relied on they said: The plaintiffs "contend that such a custom is in accordance with Hindu feeling and the Shastras, and that it was recognized by the decree of the Sudder Adawlut in 1840, and that, since then, they have, until a few years ago, resisted every attempt of the Tengalais to conduct such processions and worship. The decree of the Sudder Adawlut was based on the opinion of the Hindu Pandits as to the Hindu law applicable to the case, but it cannot be denied that the law of British India, as laid down in later cases, is opposed to the view of the Pandits. As pointed out by this Court in *Parthasaradi* v. *Chinna Krishna* (2), following the decision of the Sudder Court—*Sambalinga Moorty* v. *Vembarry Govinda Chetty* (3)—the right to conduct religious processions in the public streets is a right inherent in every person, provided he does not thereby invade the rights of property enjoyed by others, or cause a public nuisance, or interfere with the ordinary use of the streets by the public, and subject to such directions or prohibitions as may be issued by the magistrate to prevent obstructions to the thoroughfare or breaches of the public peace. In the present case it is not suggested that the plaintiffs have been prevented from exercising any right, or obstructed in the exercise of any right, by the defendants, nor is it alleged that the plaintiffs have suffered any injury or damage, save, perhaps, such moral or sentimental injury as might result from seeing a religious procession which one would rather not see. In the Full Bench case *Sundram Chetti* v. *The Queen*, *Ponnusami Chetti* v. *The Queen* (4) Turner C.J. is reported to have said: 'With regard to privileges

(1) (1889) I. L. R. 12 Madr. 356.
(2) (1882) I. L. R. 5 Madr. 304-9.
(3) M. S. D. 1857, p. 219.
(4) (1883) I. L. R. 6 Madr. 203.

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claimed on the ground of caste or creed, I may observe that they had their origin in times when a state religion influenced the public and private law of the country, and are hardly compatible with the principles which regulate British administration, the equal rights of all citizens, and the complete neutrality of the State in matters of religion. The members of one caste have not been allowed to restrict members of other castes from the free use of public thoroughfares. The pariah in Malabar is no longer excluded from Courts of justice. These are innovations, but the superseded usages are obviously condemned by the spirit of our laws. When anarchy or absolutism yield place to well-ordered liberty, change there must be, but change in a direction which should command the assent of the intelligence of the country. With regard to processions, if they are of a religious character, and the religious sentiment is to be considered, it is not less a hardship on the adherents of a creed that they should be compelled to intermit their worship at a particular point, than it is on the adherents of another creed that they should be compelled to allow the passage of such a procession past the temples they revere. But the prejudices of particular sects ought not to influence the law. A man may have just ground of complaint if he is compelled to recognize the sanctity claimed for a place as the seat of worship he believes to be false; he has no just ground of complaint if he is compelled to recognize the civil right of his fellow citizens to be protected from disturbance when they are assembled for public worship, unless indeed all recognition of public worship is repugnant to him. Again, assuming that the Courts were satisfied that a privilege had been duly acquired and that it was competent to them to recognize it, it must be remembered that it is based on custom and that custom is sound only when and so far as it is reasonable. It would have then to be considered whether it was reasonable to require persons exercising a natural right to abstain from its exercise when passing a place where no public worship was proceeding.'

"We think that these observations are appropriate to the present case.

"We do not think that the custom which the plaintiffs plead is

a reasonable one or such as the Courts should recognize any more than the courts would now recognize the practice widely prevalent in Malabar by which men of the Cheruman caste are obliged to leave the public road if they meet a man of the Nair caste on it. We have not been referred to a single reported case in which such a right of one sect to interdict a rival sect from the use of the public streets has been recognized by the superior Courts in India. Even in the case of the present disputants the decision of the Sudder Adawlut proceeded on the ground that the Tengalais had failed to prove that their proceedings were in accordance with established usage. It did not proceed on the view that the Vadagalais had a right in themselves to regulate worship in the streets, or to interdict the use of the streets to the other sect.

"The correct view, as stated in the later cases, is that every member of the public, and every sect, has a right to use the public streets in a lawful manner, and it 'lies on those who would restrain him in its exercise to shew some "law" or "custom having the force of law" depriving him of the privilege.' (1)

"In our opinion no such custom has been established in the present case."

Cohen, K.C., and *De Gruyther*, for the appellants, contended that the right as claimed was established, that the custom pleaded was valid in law and ought to be enforced, and also that the decree of 1840 established the appellants' contention of res judicata. The right claimed was that of procession in certain streets, not a right to prevent anyone else from exercising public worship over a large and indefinite area. The particular streets had centuries ago been dedicated as claimed, and the appellants' right therefore had a legal origin, and had been acquiesced in by the respondents. They referred to *Sadagopachari* v. *Krishnamachari* (2); *Anandrav Bhikaji Phadke* v. *Shankar Daji Charya* (3), to the effect that the case was within the cognizance of the civil Courts; *Shrikhanti Narayanappa* v. *Indupuram*

(1) M. S. D. 1857, p. 223.
(2) I. L. R. 12 Madr. 356.
(3) (1883) I. L. R. 7 Bomb. 323.

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Ramalingam (1), as to the whole body of the sect being bound by litigation in which they had been represented by a few of their number; *S. Sundaram Ayyar* v. *Municipal Council of Madura* (2), as to the effect of streets being vested in a municipality; *Niha Chand* v. *Azmat Ali Khan* (3); *Kaveri Ammal* v. *Sastri Ramier* (4); Madras Lands Board Act, V. of 1884, s. 3 (*g*), as to definition of street and the subsoil thereof not being vested in the municipality; and to *Johnson* v. *Barnes* (5) and *Tyson* v. *Smith.* (6) Reference was also made to *Phillip* v. *Halliday* (7); *Mayor of Tunbridge Wells* v. *Baird* (8); *Clippen's Oil Co.* v. *Edinburgh and District Water Trustees.* (9) Upon the point of res judicata they referred to *Commissioners of Sewers of City of London* v. *Gellatly* (10); *Cockburn* v. *Thompson* (11); *Partha-saradi* v. *Chinna Krishna.* (12)

Ross, for the respondents, contended that there were concurrent findings that the village of Tiruvendipuram never at any time belonged exclusively to the Vadagalais. Like other portions of British India, it had belonged to the former rulers, and now to the British Government, from whom the inhabitants derive their rights. Its streets are public, and are within Madras Act V. of 1884. The use of the streets is free to all persons and sects, subject to the control of the Government, and no person or sect can acquire any legal right therein by virtue of which he can interdict their free use by others. The custom set up by virtue of which the appellants claimed was not proved, and is not reasonable or enforceable at law. Further, the decrees relied upon do not operate as res judicata, for the parties to this suit are not the same as, nor do they represent, the parties to the former proceedings or the rival sects. The subject-matter is not the same, and the questions at issue are not the same. The relief claimed in this suit is larger than in the former. Then Mahamuni alone was named, now it is any alien deity.

De Gruyther replied.

(1) (1866) 3 Madr. H. C. Rep. 226, 229.
(2) (1901) I. L. R. 25 Madr. 635.
(3) (1885) I. L. R. 7 Allah. 362.
(4) (1902) I. L. R. 26 Madr. 104.
(5) (1873) I. L. R. 8 C. P. 527.
(6) (1838) 9 A. & E. 406.
(7) [1891] A. C. 228, 231.
(8) [1896] A. C. 434.
(9) [1904] A. C. 64.
(10) (1876) 3 Ch. D. 110.
(11) (1809) 16 Ves. 331.
(12) I. L. R. 5 Madr. 304.

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March 21.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a judgment and decree of the High Court at Madras, affirming the decision of the District Judge of South Arcot, which dismissed the appellants' suit with costs.

The High Court refused leave to appeal on the ground that the matter in dispute was below the appealable value. Special leave, however, was granted on the representation that the appeal raised questions of law of general importance touching the rights of religious bodies in India in regard to public processions, and the right of one religious body to prevent a rival sect and an alien deity from invading precincts apparently public, but devoted or appropriated from time immemorial to the observance of its own peculiar ritual and worship; and at the same time involved the consideration of the effect of previous decisions on similar questions between members of different sects of one and the same community.

The suit was the outcome of a long-standing feud between Vadagalais and Tengalais—two sects of Vaishnava Brahmins residing in the village of Tiruvendipuram, in the district of South Arcot. The village contains an ancient Vaishnava temple dedicated to Devanayaka Swami. Annexed to it is the shrine of a saint named Vedanta Desika, who is held in great veneration by the Vadagalais. The Tengalais, on the other hand, worship a saint said to belong to more modern times and called Manavala Mahamuni. In 1807 a number of Tengalais sued a number of Vadagalais for damages for having prevented them from placing an image of their saint in the temple. The suit was dismissed, and the idol which the Tengalais had set up was removed by order of the Court. In 1828 the Tengalais set up an image of their saint in a private house and began to hold processions through the streets in its honour. Then a number of the Vadagalais brought a suit against a number of the Tengalais complaining of their having publicly worshipped the saint and carried the idol in procession through the streets. The Vadagalais alleged that the streets traversed by the procession were attached to the temple, and that the worship of the Tengalai saint was contrary to established custom and usage.

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Questions were then addressed to the Hindu Pandits. In accordance with their opinion, which seems to have been based not so much on legal grounds as on precepts relating to ritual and ceremonial observances to be found in ancient treatises on such subjects, the Court ordered that the service which the Tengalais had established should be discontinued, and awarded damages to the plaintiffs. On appeal to the Court of Sudder Adawlut the decree was varied to the extent of permitting worship of the Tengalai idol in private houses, while public processions in its honour were prohibited as unauthorized innovations. The feud continued. There was further litigation, and there were divers proceedings before the magistrate with varying success, until, in 1886, the then magistrate refused to prohibit the public worship of the Tengalai idol and referred the Vadagalais to the civil Court. The Vadagalais then moved to enforce the order of the Sudder Adawlut by arrest and imprisonment of certain persons who were descendants of some of the defendants in the suit of 1828. The petition was dismissed, and at last the Vadagalais brought the present suit asking for a declaration of their right to prohibit the public worship of the Tengalai idol and processions in its honour, and praying for an injunction accordingly. They based their claim to relief on the allegation that the Vadagalais were originally the owners of all the land in the village, and only allowed houses to be built and streets formed subject to the reservation that no worship or procession of a Tengalai idol should be permitted there. They contended that, even if strict proof of that allegation were wanting, a conditional or limited dedication of the streets to the public should be presumed, and that at any rate they had acquired, by immemorial usage and custom, the right to prevent the worship and processions of any alien deity in their streets. Lastly, they submitted that, so far as Manavala Mahamuni was concerned, the rights of the parties were concluded by the decision in the suit of 1828, and that the matter to that extent was res judicata.

Both Courts have decided against the plaintiffs. It seems to their Lordships that the decision is perfectly right. There is no trace of any evidence tending to shew that the site of the village was at any time the private property of the Vadagalais. The

village is an ordinary ryotwari village. The streets are public streets now vested under the Madras Act No. V. of 1884 in the local board. All members of the public have equal rights in them. If the Vadagalais had any valid objection to the streets of the village being vested in the local board, they had the opportunity of raising the objection by appeal to the Governor-General in accordance with the provisions of the Act. Even if they had had any such rights as they claim in the present suit at the time when the Act of 1884 came into force in the village of Tiruvendipuram, it would be much too late for them to set up such a claim now.

The plea of res judicata is equally untenable. The suit of 1828 was not a representative suit binding property, or even designed or framed for the purpose of binding for all time the Tengalai community, if there is any body that can be so described, and if such a suit were competent. It was a suit against certain persons alleged to be wrong-doers in their individual capacity.

The rusult is that the suit completely fails, and their Lordships may observe that it does not seem to involve such far-reaching issues as were put forward in the petition asking for special leave to appeal.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants : *Lawford, Waterhouse & Lawford.*
Solicitor for respondent : *Douglas Grant.*

J. C.* FAIYAZ HUSAIN KHAN . . . . . DEFENDANT;

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AND

Feb. 6; *March* 21. MUNSHI PRAG NARAIN AND OTHERS . . . PLAINTIFFS.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Transfer of Property Act, s. 52—Construction—Suit is contentious before Summons served—Lis pendens.

Held, that, according to the true construction of s. 52 of the Transfer of Property Act, there is no warrant for the view that a suit contentious in its origin and nature is not so within the meaning of the section until after summons served on the opposite party.

In an action of ejectment brought by the purchaser at an execution sale under a decree obtained by the first mortgagee, it appeared that after the first mortgagee's suit was filed, but before the summons was served, a second mortgage had been created, and that in execution of a decree thereon, to which the first mortgagee was no party, the mortgagor's son had bought, and now defended possession of, the mortgaged estate :—

Held, that the defendant's purchase was pendente lite and did not affect in any way the first mortgagee's title, and that the defendant could neither resist ejectment nor redeem.

APPEAL by special leave from a decree of the above Court (August 10, 1904), affirming a decree of the Subordinate Judge of Sitapur (July 4, 1903).

The question decided was whether an alienation made by a mortgagor two days after a suit brought against him by the mortgagee, but before he had been served with a summons, was an alienation pendente lite of no effect against any decree made in the suit.

The alienation was made on July 15, 1891, by way of second mortgage. The second mortgagee obtained a decree without making the plaintiff (the first mortgagee) a party, and in execution the property was sold to the appellant. The respondent was a purchaser under the first mortgagee's decree, and sued to eject the appellant. Both Courts decided that the

* *Present* : LORD MACNAGHTEN, LORD DAVEY, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

appellant's purchase, prior in point of time to that of the respondent, was void against him under s. 52 of Act IV. of 1882 as having been made pendente lite. The appellate Court added that the respondent was entitled to priority on the ground that " a purchaser at a sale held in execution of a decree for sale on a first mortgage made by a person in possession of the property, the decree having been obtained in a suit brought in strict accordance with s. 85 of Act IV. of 1882, is entitled to possession as against a purchaser at a sale held in execution of a decree for sale obtained in a suit brought on a second mortgage in defiance of the rule laid down in that section."

Ross, for the appellant, contended that the doctrine of lis pendens was not applicable to the facts of the case. The mortgage of July 15, 1891, no doubt was after suit filed, but two months before the service of summons. He referred to s. 52, above mentioned; *Radhasyam Mohapattra* v. *Siba Panda* (1); *Parsotam Saran* v. *Sanchi Lal* (2); *Abboy* v. *Annamalai* (3); 2 Coote on Mortgages, p. 1344; Fisher, 5th ed. p. 533; Hukm Chand's Law of Res Judicata, p. 694; and to two American cases there cited, which also recognized that there could be no lis pendens until after the summons had been served—*Leitch* v. *Wells* (4) and *Dawson* v. *Mead*. (5) Even assuming that the respondent had made out his title to possession as against the appellant, still the appellant was entitled to redeem.

De Gruyther, for the respondent Prag Narain, contended that the sale to the appellant was void as against the sale to the respondent, both under the general doctrine of lis pendens and under s. 52 of the Transfer of Property Act. There is no foundation for the doctrine that a suit does not become contentious within the meaning of s. 52 until after service of summons; but even if there were it would not avail the appellant, for the evidence shews that he purchased with full notice of the suit brought and decree obtained by the first mortgagee, Newal Kishore. The decree for sale under which

(1) (1888) L. L. R. 15 Calc. 647.
(2) (1899) I. L. R. 21 Allah. 408.
(3) (1888) I. L. R. 12 Madr. 180.
(4) (1872) 48 N. Y. 611.
(5) 71 Wisconsin, 611.

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the respondent bought was not open to objection, and it was obtained by the first mortgagee. The appellant's purchase was under a decree obtained by the second mortgagee without making the first mortgagee a party. With regard to the claim to redeem, that was too late, for it was after the sale to the respondent had been confirmed. The equity to redeem was extinguished : see Transfer of Property Act, ss. 83 and 85.

Ross replied.

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March 21.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from the Court of the Judicial Commissioner of Oudh, which affirmed a decision of the Subordinate Judge of Sitapur.

Leave to appeal was granted on the ground that the appeal involved a substantial question of law. What the question was that was supposed to be involved is, however, left somewhat in obscurity.

The facts are not in dispute.

On June 14, 1889, Hamid Husain, the owner of Mauza Bangawan, mortgaged it to Newal Kishore.

On July 13, 1891, Newal Kishore brought a suit on his mortgage.

On August 23, 1892, he obtained a decree for sale, which was made absolute on November 21, 1895.

On February 21, 1901, the property was sold in execution of Newal Kishore's decree and purchased by the respondent Prag Narain, who was the son and the representative of the decree holder.

On July 2, 1901, Prag Narain obtained a sale certificate and attempted to recover possession of the property. He was, however, obstructed in every possible way by the appellant Faiyaz Husain, who was in possession under a decree for sale obtained on a subsequent mortgage. Prag Narain was therefore compelled to bring this suit.

There was no incumbrance upon the property either at the date of the mortgage of June 14, 1889, to Newal Kishore or at the date of the institution of Newal Kishore's suit on July 13, 1891. But on July 15, 1891 before any summons in Newa

Kishore's suit was served, a second mortgage was granted by the mortgagor to Mirza Muzaffar Beg. Mirza Muzaffar Beg put his mortgage in suit on March 20, 1894, without making the first mortgagee a party, and in the absence of the first mortgagee obtained a decree for sale. In execution of this decree the property mortgaged to Mirza Muzaffar Beg was put up for sale on December 20, 1900, and bought by the appellant Faiyaz Husain, who was the son of Hamid Husain, and who had attained his majority in 1894. Faiyaz Husain managed to get possession and resisted all attempts on the part of the respondent Prag Narain to dispossess him.

The case seems to their Lordships to be clear. The mortgage to Mirza Muzaffar Beg was made during the pendency of Newal Kishore's suit, which was in its origin and nature a contentious suit, and was at the time being actively prosecuted. Therefore, under s. 52 of the Transfer of Property Act (No. IV. of 1882), it did not affect the rights of Newal Kishore under the decree made in his suit. Their Lordships are unable to agree in the view which seems to have obtained in India that a suit contentious in its origin and nature is not contentious within the meaning of s. 52 of the Act of 1882 until a summons is served on the opposite party. There seems to be no warrant for that view in the Act, and it certainly would lead to very inconvenient results in a country where evasion of service is probably not unknown or a matter of any great difficulty.

The doctrine of lis pendens, with which s. 52 of the Act of 1882 is concerned, is not, as Turner L.J. observed in *Bellamy* v. *Sabine* (1), "founded upon any of the peculiar tenets of a Court of Equity as to implied or constructive notice. It is . . . . a doctrine common to the Courts both of law and of equity, and rests . . . . upon this foundation, that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendente lite were permitted to prevail." The correct mode of stating the doctrine, as Cranworth L. C. observed in the same case, is that "pendente lite neither party to the litigation can alienate the property in dispute so as to affect his opponent."

(1) (1857) 1 D. & J. 566, at p. 584.

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Apart, however, from the doctrine of lis pendens, which seems to their Lordships to apply to the present case, it is plain that at the date of his purchase Faiyaz Husain knew all about the mortgage to Newal Kishore and the decree made on the basis of that mortgage, and he knew that the sale proceedings were actually in progress, for in July, 1898, he brought a suit against Prag Narain asking for a declaration that Newal Kishore's mortgage, and the decree passed upon it, were invalid, and that the property was not liable for attachment and sale.

At the hearing of the appeal to the Court of the Judicial Commissioner Faiyaz Husain asked to be let in to redeem. The Court very properly rejected that application. It has been repeated at the hearing before this Board. There seems to be no ground for the application. Before the sale to Prag Narain was confirmed Faiyaz Husain had every opportunity of redeeming the property. He never offered to do so. On the sale being confirmed the equity of redemption was extinguished. Prag Narain appears to be in as good a position as any outside purchaser unconnected with the property would have been. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent Prag Narain: *Barrow, Rogers & Nevill.*

BACHOO HURKISONDAS . . . . . PLAINTIFF;

AND

MANKOREBAI AND OTHERS . . . . . DEFENDANTS.

J. C.*
1907
Feb. 14;
May 9.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Hindu Law of Adoption—Rights of adopted Son in ancestral Estate—Rights of sole Survivor of a Hindu joint Family.

In a suit by the posthumous son of one of two Hindu brothers forming a joint Hindu family for a declaration that he was exclusively entitled to the ancestral property, it appeared that the other and surviving brother died before the plaintiff's birth leaving a will whereby he validly made certain dispositions liable to be defeated by the plaintiff's birth, but expressly authorizing his widow in any event to adopt a son, which adoption was effected after the plaintiff's birth :—

Held, that the son so adopted became by virtue of his adoption jointly entitled with the plaintiff to the estate in suit.

Sri Raghunada v. *Sri Brozo Kishoro*, (1876) L. R. 3 Ind. Ap. 154, followed.

APPEAL from a decree of the High Court (January 25, 1904), modifying a decree of Tyabji J. (October 4, 1902).

The suit was brought by the appellant, under the circumstances stated in their Lordships' judgment, to establish his exclusive title to the property in suit and to question the legality of the alleged adoption of Nagurdas, the second respondent.

The lower Courts agreed in upholding the adoption, but differed as to the validity of a gift of Rs. 20,000 made to the sixth defendant by her father Bhagwandas, the first Court holding that the gift was invalid. The principal question decided by their Lordships was whether a Hindu coparcener by will can authorize his widow to adopt a son so as to divest his coparcener, in whom, as survivor, the whole ancestral estate has become vested, and thus diminish his share, which has become augmented by law.

With regard to the gift and adoption in dispute, it appeared that on November 5, 1900, Bhagwandas made a gift of Rs. 20,000 Government promissory notes to his only daughter, named

* *Present* : LORD MACNAGHTEN, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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Navalbai, and on the 30th of the same month he made a will whereby he appointed the first three defendants, along with two others, his executors. In the 9th clause of the will the testator gave the following directions : " I hereby direct my wife to adopt a son to me but such adoption must be made by the consent of Sir Balchandra Krishna and Rao Bahadur Ghansham Nilkant Nadkarni ; such adoption is to be made even though a son is born to my brother's widow. In the event of a son being born to my brother's widow, however, my wife should before making the adoption enter into an agreement with the adopted son or his proper guardian that such adopted son shall be bound to accept as valid the provisions hereby made for my daughter Navalbai and my wife."

Tyabji J. decided that the adoption of Nagurdas by the widow of Bhagwandas was duly made and valid in law, and that he became a coparcener with the plaintiff, who but for the adoption would have been the exclusive owner of the properties in suit, and that it was not to the interest of either that a partition of those properties should be made. In regard to the contention that there could be no valid adoption into a joint family, even if such adoption were made with the express authority of the husband, he observed : " Numerous authorities were cited to me on this point, not always reconcilable with each other, and laying down more or less conflicting principles, but it seems to me that sitting as a single judge, in a Court of first instance, the point is not open to me for discussion. I am concluded by the decision of the Privy Council in *Sri Raghunada* v. *Sri Brozo Kishoro* (1), as explained and acted upon by the Calcutta High Court in *Surendra Nandan* v. *Sailaja Kantdas* (2), where the authorities bearing on this point were fully discussed, and it was decided that when the widow adopts, with the full authority of her husband, the adoption even into a joint family is valid and the adopted son takes an interest in the property of the family accordingly."

The High Court affirmed this judgment in regard to the adoption, its validity, and legal effect, and also declined to direct a partition. It held the gift to Navalbai to be valid.

(1) L. R. 3 Ind. Ap. 154.

(2) (1891) I. L. R. 18 Calc. p. 385.

Jardine, K.C., and *Ross*, for the appellant and his mother Gangabai, the fourth respondent, contended that the testamentary power to adopt, and the adoption following thereon, were invalid in law. Bhagwandas thereby attempted to make a disposition of his property, which Hindu law does not allow. The ancestral estate had vested solely in the appellant by survivorship on the death of Bhagwandas. It could not afterwards be divested to the extent of Bhagwandas's share, nor could that share be transferred to the alleged adopted son on his adoption. Bhagwandas's widow had no power to adopt so as to vest in the adopted child a share in the ancestral estate without the consent of the appellant or his guardian. Moreover, the adoption was not made from a proper motive : see, however, the full bench case of *Ram Chandra Bhagwan* v. *Mulji Navabhai* (1), which lays down that the motive for adopting is irrelevant, a ruling which must be compared with that in *Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi*. (2) With regard to the doctrine of divesting the ownership of the appellant in favour of the adopted son, reference was made to *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (3) ; *Thyammal* v. *Venkatarama* (4) ; *Rupchand Hindumal* v. *Rakhmabai* (5) ; *Sri Raghunada* v. *Sri Brozo Kishoro* (6) ; *Surendra Nandan* v. *Sailaja Kant Das* (7) ; *Bapuji Lakshman* v. *Pandurang* (8) ; *Kalidas Das* v. *Krishna Chandra Das.* (9) Then, with regard to the other point in the case, namely, the gift to Navalbai, the third respondent, it was contended that Bhagwandas had no power to deal with the property in that way. The gift was not a valid gift, being beyond the disposing power of the donor. It was not given for Navalbai's marriage, it was given very shortly before his death, and there was no special reason or urgency for making such a gift. Reference was made to *Parvati* v. *Ganpatrao.* (10) As to the share which the adopted son was entitled to if his adoption was held valid, and the Court decreed partition, see

(1) (1896) I. L. R. 22 Bomb. 558.
(2) (1876) L. R. 4 Ind. Ap. 1, 14.
(3) (1865) 10 Moo. Ind. Ap. 279, 309.
(4) (1887) L. R. 14 Ind. Ap. 67.
(5) (1871) 8 Bomb. H. C. R. A. C. J. 114, 119.
(6) L. R. 3 Ind. Ap. 154, 193.
(7) I. L. R. 18 Calc. 385.
(8) (1882) I. L. R. 6 Bomb. 616.
(9) (1869) 2 Beng. L. R. (F. B.) 103.
(10) (1893) I. L. R. 18 Bomb 177, 183.

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Raghubanund Doss v. *Sadhu Churn Doss* (1) and *Ramasawmi Aiyan* v. *Vencataramaiyan.* (2)

Cohen, K.C., and *De Gruyther*, for the first three respondents, the widow and adopted son and daughter of Bhagwandas, were heard on the question of the legal rights and status of the adopted son under the circumstances, assuming the adoption to be proved in fact and valid in law. They contended that his adoption operated to constitute him a member of the joint family, with all the rights in the ancestral estate which would have accrued to him had he been a member by birth. According to Hindu law, the shares in the joint ancestral estates were, until partition, always liable to be increased by deaths or diminished by births, regardless of any doctrine as to vesting. An adopted son in no way differed in that respect from a born son. He was entitled to succeed on partition to the share which would have accrued to his father had he been living, and until partition was interested in the joint estate as a male member of the joint family. The family continued to be a joint one so long as any widow remained in it with a power to adopt. The family estate, therefore, never vested solely and absolutely in the appellant, and no divesting on the adoption by Bhagwandas's widow was necessary. It was joint estate in his hands, and a coparcenary interest therein was immediately created by the adoption. Reference was made to West and Buhler, p. 600; *Bhoobun Moyee Debia* v. *Ramkishore Acharj Chowdhry* (3) ; *Kathama Natchiar* v. *Rajah of Shivagunga* (4) ; *Jogendra Bhupati Hurri Chundun Mahapatra* v. *Nityanund* (5) ; *Sri Raghunada* v. *Sri Brozo Kishoro* (6) ; Mayne's Hindu Law, 7th ed. p. 241 ; *Surendra Nandan* v. *Sailaja Kant Das* (7) ; *Mondakini Dasi* v. *Adinath Dey* (8); *Vithoba* v. *Bapu* (9); *Pudmacoomari Debi* v. *Court of Wards* (10) ; *Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi.* (11) With regard to the gift to Navalbai it was contended that it was valid and within the disposing power of

(1) (1878) I. L. R. 4 Calc. 425.
(2) (1879) L. R. 6 Ind. Ap. 196.
(3) 10 Moo. Ind. Ap. 279, 309.
(4) (1863) 9 Moo. Ind. Ap. 539, 589.
(5) (1890) L. R. 17 Ind. Ap. 128, 131,
(6) L. R. 3 Ind. Ap. 154, 193.
(7) I. L. R. 18 Calc. 385, 398.
(8) (1890) I. L. R. 18 Calc. 69.
(9) (1890) I. L. R. 15 Bomb. 110.
(10) (1881) L. R. 8 Ind. Ap. 229.
(11) L. R. 4 Ind. Ap. 1, 8.

Bhagwandas. The state of the property justified it, and the High Court found that it was made, not out of the corpus of the estate, but out of the income. The partition asked for had been rightly refused by the Courts below. Reference was made to *Appovier* v. *Rama Subha Aiyan* (1) ; Mayne's Hindu Law, 7th ed. p. 370 ; and West and Buhler, p. 994.

Jardine, K.C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. In the year 1900 two brothers, Hurkisondas and Bhagwandas, formed a joint Hindu family governed by the Mitakshara law as in force in Bombay, and as such they held large ancestral property.

On September 14, 1900, Hurkisondas died without male issue, but leaving his widow pregnant. On November 30 of the same year Bhagwandas made his will, by which he purported to make certain dispositions of the family property, and also directed his widow to adopt a son. The terms of this will will be considered hereafter. On December 17 following Bhagwandas died, and on the next day Hurkisondas's widow gave birth to a son Bachoo, the present plaintiff and appellant. On February 17, 1901, Bhagwandas's widow adopted Nagurdas as son to her deceased husband, with the consents prescribed by his will.

The parts of that will material for the present purpose are the following :—

By clause 2 he appointed executors and trustees.

" 4. I have a daughter by name Navalbai. I direct that my executors and trustees shall get her suitably married (if she is not married in my lifetime), at an outlay of Rs. 5,000 five thousand or thereabouts. I also direct that they shall on the occasion of her marriage present her with ornaments of the value of Rs. 10,000 ten thousand or thereabouts and wearing apparel and silver pots of the value of Rs. 5,000 five thousand or thereabouts.

" 5. I further direct that my executors and trustees shall during her lifetime place at her absolute disposal two carriages

(1) (1866) 11 Moo. Ind. Ap. 75.

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and two horses and maintain the said carriages and horses out of my estate.

"6. I hereby direct my executors and trustees to set apart for my said daughter so much of my immovable property at Kasu as will yield a net income of Rs. 200 two hundred per month. I also devise and bequeath to her my house in Bombay which opens on Narayen Dhuru Street and Bibi Jan Street, and bears Nos. 13—23, 61—69. She is to enjoy the said immovable property and the said house during her lifetime, and on her death the said property and house shall belong to such of her children as may be born or conceived in my lifetime, but in default of her having any such children I hereby give her power to appoint the said property and house in such manner as she may in her absolute discretion deem fit. In the event of her not making any such appointment, and not leaving any such children as aforesaid, I direct that the said property and house shall after her death be treated as a part of the residue of my estate."

Clause 7 dealt with the contingency of the brother's widow giving birth to a daughter, and purported to make provision for the girl, in a manner somewhat similar to that made for the testator's own daughter.

Clause 8 contained provisions for the two widows, the testator's and his brother's.

Clause 9 said: "I hereby direct my wife to adopt a son to me but such adoption must be made with the consent of Sir Bhalchandra Krishna and Rao Bahadur Ghansham Nilkant Nadkarni; such adoption is to be made even though a son is born to my brother's widow. In the event of a son being born to my brother's widow, however, my wife should, before making the adoption, enter into an agreement with the adopted son or his proper guardian that such adopted son shall be bound to accept as valid the provisions hereby made for my daughter Navalbai and my wife."

These are all the facts relevant to the principal questions arising in the present case.

The plaint was filed in the High Court of Bombay on February 28, 1901, immediately after the adoption, on behalf of Bachoo, the posthumous son of Hurkisondas, against a number

of persons, amongst whom was the fifth defendant, the adopted son of Bhagwandas. The main controversy in the case lay between those two parties. The plaint asked for a declaration that the plaintiff is exclusively entitled to the ancestral property, that the fifth defendant is not the adopted son of Bhagwandas, and is not entitled to any interest in the estate. In the alternative, in case the exclusive right of the plaintiff should not be established, the plaint asked for partition. All these claims were opposed.

Tyabji J., who tried the case, held that the adoption was valid, and rejected the claim of exclusive right set up on behalf of the plaintiff. He further refused to order a partition, on the ground that it would not be beneficial to the infants concerned, or to either of them. On all these points the Court of Appeal agreed with him.

On the last point, that of partition, it is enough to say that their Lordships entirely concur with the Courts in India.

As to the adoption and its effect, the first point raised by the appellant was this: It was contended that, on the face of the will, the power to adopt was a part of a plan for the disposition of the family property which was in contravention of the law, and that the power was dependent upon that plan having effect.

But this is to misread the will.

The dispositions made by the testator were within his competence at the date of the will and at the date of his death; they were only liable to be defeated in one event (which in fact happened), namely, his brother's widow giving birth to a son. And the will expressly said that, supposing that event to occur, the adoption should still be made.

The next point raised was as to the effect of the adoption upon the title to the joint property. It was contended that, at the time when the adoption took place, the family estate had become vested absolutely and exclusively in the infant Bachoo, plaintiff-appellant, and that the adoption could not detract from the right so vested. Their Lordships are, however, of opinion, as were the Courts in India, that the case of *Sri Raghunadha* v. *Sri Brozo Kishoro* (1), decided by this Board, governs this case and excludes the appellant's contention.

(1) L. R. 3 Ind. Ap. 154

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The point that remains for consideration is quite unconnected with the other questions in the case. Navalbai, the daughter of Bhagwandas, was made a defendant in the suit. In her written statement she alleged that she was absolutely entitled to Government promissory notes, of the nominal value of Rs. 20,000, as given to her and transferred to her name by her father in his lifetime. As to the fact of the gift and the transfer there is now no controversy. At the time of the gift Bhagwandas was the head of the family, and indeed the only male member of it, and the estate was large. Tyabji J. considered that the gift was not justified by the circumstances of the case. The Court of Appeal, having in the meantime ascertained that the gift was made out of income, not out of capital, took a different view, and decided in favour of Navalbai.

The question belongs to a class in respect of which this Board is always very unwilling to interfere with the decisions of the Courts in India; and no sufficient reason has been shewn why they should do so in the present instance.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs.

Solicitors for appellant and fourth respondent: *Payne & Lattey.*

Solicitors for first three respondents: *Hughes & Sons.*

KESSOWJI ISSUR . . . . . PLAINTIFF; J. C.*

AND

GREAT INDIAN PENINSULA RAILWAY COMPANY . . . . . } DEFENDANTS. 1907 April 24; May 9.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Admission of Fresh Evidence by Appellate Court—C. C. P., ss. 568, 623—*Construction—Procedure in Appeal.*

After judgment for damages had been obtained by the plaintiff in respect of injuries sustained by him in alighting from a train which had overshot the platform, the trial judge refused an application of the defendant railway company under s. 623 of the Civil Procedure Code for a new trial on the ground of discovery of new matter :—

Held, that the High Court had no jurisdiction under s. 568 to reverse this refusal and, in consequence, admit fresh evidence. Its power thereunder is limited to supplying any inherent lacuna or defect which appears on examining the evidence as it stands, and does not relate to the discovery of new matter outside the Court.

The trial judge having found on the evidence that insufficiency of light was the main cause of the plaintiff's accident, the judges of the High Court, on their own suggestion, welcomed by counsel, visited the scene under conditions which they regarded as closely resembling those which attended the accident, and as a result of their observations allowed the appeal :—

Held, that the case must be decided on the legal evidence adduced at the trial, which was sufficient to establish the negligence of the defendants. The question of light could not be isolated from the rest of the case, and the above procedure in appeal could not be approved.

APPEAL from a decree of the High Court (December 23, 1904), reversing a decree of Tyabji J. (July 14, 1904).

The action was brought to recover damages for injuries to the plaintiff under the circumstances stated in their Lordships' judgment. The negligence complained of was that the compartment in which the plaintiff was travelling overshot the platform and was drawn up opposite to the foot of a slope where the lighting was insufficient. The defendants traversed the allegation that the compartment in question was drawn up opposite to the slope, and asserted that it was drawn up opposite to the platform itself, and, after traversing the allegation that there

*Present: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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was insufficient light on the slope, alleged that the plaintiff was well acquainted with the station and the slope, and that his injuries were caused by his own negligence and carelessness, and could have been avoided by the exercise of ordinary care and caution on his part.

The findings on the evidence as to negligence are thus stated by Tyabji J. :—

"The conclusions of fact at which I have arrived from a review of the evidence are that : (1.) This second-class carriage in which the plaintiff was travelling had overshot the platform ; (2.) that this second-class carriage stood opposite the slope of the platform ; (3.) that it was dark ; (4.) that the purpose of the defendants, their intention, their avowed object, and their instructions to their servants were to draw up the train at the platform—that although, as the witnesses state, the trains did now and then overshoot the platform, they were usually at the platform ; (6.) that the plaintiff, who had constantly travelled by this train between Victoria Terminus and the Sion Station, had in his own experience never known the train to overshoot the platform, but he always got down on to the platform from his carriage ; (7.) and that no warning of any kind was given to the plaintiff, and he was not in any manner made aware that his carriage was not opposite the platform as usual, but was opposite the slope.

"I say it was dark, because the train arrived at Sion at about 53 or 54 minutes past 6. On that day the sun set at 6.12 or 6.13, and the twilight lasted 38 minutes ; therefore, the daylight had ceased at 6.13, and the reflected twilight had ceased at about 6.51. And this accident took place at about 6.54 ; that is to say, after all light from the sun had entirely disappeared.

"As regards the artificial light, there were four lamps ; but they were at great distances from each other. They did not throw sufficient light, even on to the platform ; but if they did, none of them threw any light on this particular slope, where I hold it proved that the plaintiff fell.

"This slope (the highest point of it is three feet above the ground) is about sixteen feet in length, and it is obvious that, if there is not sufficient light for a man to see exactly where he is

alighting, and if he imagines that his carriage is drawn up at the platform as usual, it is obvious, I say, that he can sustain these injuries without any neglect or default on his own part.

"And I, therefore, hold that the defendant company was negligent in drawing up this carriage at the slope, in not providing sufficient light to the plaintiff to see that it was drawn up at the slope and not at the platform, and in not cautioning him in any way that he was to use more than the usual amount of care that the law demands from the passengers by these railways."

The appellate Court, on the application of the defendants under s. 568 of the Civil Procedure Code, ordered that further evidence should be taken without recording any reasons for so doing. It found that the appellant's carriage did overshoot the level of the platform and was drawn up alongside the slope; and that the appellant's injuries were received by a shock or fall on alighting, and not by a fall after he had alighted. It was not disputed that the stoppage of the train was under the circumstances an invitation to alight. The judges of the Court of Appeal went to Sion Station under conditions intended to represent those existing at the time of the accident, and came to the conclusion that the twilight had not ceased, and that the lamps of the train afforded sufficient light to enable the appellant to have alighted safely. The Court of Appeal therefore decided that there was no concealed danger and no negligence on the part of the company, and accordingly dismissed the suit.

Cohen, K.C., and *De Gruyther*, for the appellant, contended that the evidence supported the judgment of Tyabji J. The High Court erred in admitting fresh evidence. They referred to ss. 568 and 623 of the Civil Procedure Code. The evidence ought not to have been admitted—was it not required within the meaning of s. 568—and no reasons for its admission were recorded as required by s. 568. There was therefore no jurisdiction to admit it, and findings based thereon should be excluded. To admit fresh evidence the defendants must shew that after the exercise of due diligence it was not within their knowledge or

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capable of being produced at the trial. This was finally decided against them on an application for review. The evidence of the witnesses who saw the accident on March 30, 1903, as to the condition of the light, natural and artificial, at the time is the only legal evidence on which the Court should act. As for the visit of the High Court judges to the scene of the accident on December 8, 1904, that might be regular if they wished to visit the locality or scene where the accident took place, but it was irregular if it was to assist at a presentation or rehearsal of the occurrences on the assumption, correct or otherwise, that on that day the natural light was the same as on March 30. The result of this so-called local investigation could not be allowed to supersede the legal evidence of actual occurrences given at the trial, by which alone the judgment of the Court should have been guided. They referred to *Bridges* v. *North London Ry. Co.* (1); *London and North-Western Ry. Co.* v. *Walker.* (2)

Sir R. Finlay, K.C., and *Tyrrell Paine*, for the respondents, contended that the judges of the High Court had discussed with counsel their projected visit to the scene of the accident, and it was with the consent of both sides that they did so under conditions which were ascertained to approximate as nearly as possible to those existing at the time of the occurrence. They were entitled in their discretion, having regard to the words in s. 568, "for any substantial cause," and under the circumstances, to admit the evidence on which they acted. Notwithstanding the refusal of the application to review, the Court had the jurisdiction which they exercised under ss. 623 and 629 of the Civil Procedure Code. They were right, it was contended, in coming to the conclusion that there was sufficient light, both natural and artificial, to have enabled the plaintiff to leave the train with safety if he had used due care. Also in finding that the circumstances did not prove any negligence on the part of the company. And the course taken by the parties through their counsel leaving the matter in the hands of the Court for a local inspection amounted to a submission to their arbitration and precluded an appeal. There was no suggestion at the time

(1) (1874) L. R. 7 H. L. 213. (2) [1903] A. C. 289.

that the degree of light at the local investigation was in any way different from what it was on the day of the accident.

Cohen, K.C., replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The appellant was plaintiff in a suit against the respondents for damages for personal injuries alleged to have been sustained through their negligence. He was a passenger in a train of theirs from Bombay to Sion Station, and his case was that, on the evening in question, the train overshot the platform at Sion and the passengers, on the implied invitation of the respondents, alighted where the train stopped that at this place it was dark and there were no lamps; that no warning was given to the appellant that the train had passed the platform or that special care must be taken in descending; that the appellant fell heavily, and was seriously injured, and for long disabled from business. There was no dispute as to the nature of the injuries.

The case went to trial, the respondents denying liability; evidence was led at great length and the trial lasted ten days. The result was that the learned judge who tried the case gave the appellant Rs. 24,000; and it is sufficient at present to say that the judgment presents a careful and complete analysis of the evidence.

Cases of overshooting the platform and resulting accidents to passengers have so frequently been tried and considered that no question of law arises for determination. The present case is only remarkable because the respondents (in the teeth of the written report of the Sion stationmaster, made the day after the accident, that the train had overshot the platform) maintained at the trial and adduced witnesses, including this very stationmaster, to prove the contrary and that the passengers duly alighted at the platform. This fatal course was really to give away the case; it was proved to the satisfaction, even of the appellate Court, that the train did overshoot; and the respondents, by this perverse attitude, were disabled from maintaining any intelligible theory as to the conditions under which the passengers actually alighted. They could not

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pretend that the passengers were warned to take care, and all their evidence as to lamps applied to a place where the accident did not happen. It may be noted in passing that the darkness which in fact prevailed is proved by a piece of real evidence to which sufficient weight has not been given, viz., that when it became known that a man was lying hurt, lights were brought from the station.

From the description of the case now given, it is clear that the case was a commonplace and plainsailing one and required no deus ex machina, and that it was very deliberately investigated. Its subsequent course, however, was destined to be untoward.

Fourteen days after the judgment of Tyabji J. the respondents applied to him for a review of his judgment, on the ground that, since the trial, there had come to the respondents' knowledge new and important evidence which was, in short, that one of the employers of the appellant said that the appellant had lost the employment of the informant's firm owing to causes unconnected with the accident, whereas in evidence the appellant had ascribed this loss to the accident.

Now the Code of Civil Procedure permits such applications for review on the ground of such discovery, but it exacts very strict conditions so as to prevent litigants lying on their oars when they ought to be looking for evidence—it enjoins the judge to require the facts as to the absence of negligence to be strictly proved; and it makes the judge who tried the case final on such applications. The remedy is allowed (s. 623) to "any person considering himself aggrieved . . . . who from the discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed . . . . or for any other sufficient reason." And, by s. 626, "no such application shall be granted on the ground of discovery of new matter . . . . without strict proof of such allegation." In the present instance the judge refused the application, and it is manifest that the circumstances rendered it inadmissible.

The appellant had in his plaint described himself as muqaddam (1) of several mill companies; there was no doubt of his identity and as to his employment; in the witness-box he was explicit and even copious as to his loss of the agencies in question, to such an extent that the respondents objected to some of his books being produced; he was cross-examined on the subject, and this took place on June 17, 1904, the first day of a trial which did not conclude till July 2, 1904, and took place at Bombay, the scene of the transactions in question.

It is obvious that if the respondents had desired to inform themselves before or even during the trial as to this man's loss of business, all they had to do was to step round and see his employers; and it would be pessimi exempli if provisions for review were perverted to supply such omissions.

After their failure to get review the respondents appealed to the appellate Court on the whole case; and the 25th reason of appeal was that they should be given the opportunity of adducing further evidence, which had been refused by Tyabji J. on their application for review.

Having got into the appellate Court the respondents gave notice of an application for permission to examine the man Wadia, whose information had founded the application to Tyabji J., and this application was supported by affidavit, just as in the Court below. The appellate Court heard the application, and on September 30, 1904, granted it, or rather, with greater latitude, ordered that "further evidence" be taken; and taken it was, before one of the appellate judges, not merely Wadia, about whom the application was made, but several other witnesses being examined for the respondents, and the appellant being examined for himself.

Now at this stage the question is, Under what jurisdiction was this fresh evidence taken by the appellate Court? They had, as has been noticed, no jurisdiction to reverse the refusal of Tyabji J., appeal from his decision being excluded by statute. Sect. 568 of the Code of Civil Procedure can alone be looked to for sanction of this proceeding; but when its

(1) Generally the headman of a village, but in Guzarat "commonly the name of a supervisor" (Wilson).

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terms are examined they will be found inapplicable. The part of the section which alone is colourably relevant is: "If the appellate Court requires"—which plainly means needs, or finds needful—"any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial reason, the appellate Court may allow such evidence to be produced, or document to be received, or witness to be examined." The section goes on: "Whenever additional evidence is admitted by an appellate Court, the Court shall record on its proceedings the reason for such admission."

Now this evidence was admitted by the order of September 30, 1904, and that order states no reason for such admission. Prima facie, therefore, this was not done under s. 568. But, further, the ultimate judgment of the appellate Court puts it beyond doubt that in fact the learned judges were simply reviewing and reversing Tyabji J.'s refusal of review, for they frankly narrate that refusal, and go on to say: "On the case coming up in appeal it appeared to us desirable that the further inquiry invited should be undertaken." On this phraseology, "in appeal," it must be observed that the further evidence was ordered, not after the appeal on the merits had been heard and the evidence as it stood had been examined by the judges, but on special and preliminary application. This is important, because the legitimate occasion for s. 568 is when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it. That is the subject of the separate enactment in s. 623.

On these grounds it appears to their Lordships that the appellate Court had no jurisdiction to admit this evidence, that it was wrongly admitted and does not form part of the evidence in this appeal. It must, therefore, be disregarded. The evidence, however, was necessarily read and commented on; and, in fairness to the appellant, their Lordships think it right to add that they do not agree in the following analysis of it which is taken from the judgment of the appellate Court: "The result may be stated in a single sentence. There is an end to the possibility of relying upon the plaintiff's testimony."

The appeal having been heard on its merits, there ensued what, it may be hoped, is an unprecedented chapter in appellate procedure. The Court seems to have adopted the view that the train had overshot the platform, and to have considered that the crux of the case was the question of light, and this question, of course, was a complex one, what light came from the sky and what from artificial sources—the station lamps having been the artificial light relied on by the respondents. The course taken by the appellate Court had better be described in their own language :—

"Owing to this difficulty and to the vital importance of settling it with certainty, it was suggested that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries. The suggestion was welcomed by counsel on both sides, and after communication with the local observatory it was agreed that on the evening of December 8 at forty minutes after sunset the conditions now in question would be, as nearly as possible, exactly reproduced. At that time, therefore, attended by the legal advisers of both parties, we visited Sion Station, with the result that we are clearly of opinion that the plaintiff's accident must be attributed to his own carelessness and that the company cannot be held liable for negligence. By the courtesy of the railway company we were provided at Sion with the same carriage in which the plaintiff was travelling on March 30, and we were thus enabled to make a thorough investigation of the material conditions accompanying the accident."

The result was that it became manifest to the two learned judges that "a passenger of ordinary carefulness would have had no difficulty in alighting safely, even though he had nothing but the twilight to guide him. But, in fact, there was a far better light, namely, the light from the lamps in the carriage," and "this place was specially and amply lighted from the lamp of the particular compartment."

The practical result was that the appeal was allowed and the suit dismissed, the case being decided, not on the testimony given at the trial as to what took place on the night of the

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accident, but by the judges' observation of what they saw on another night altogether. Their Lordships find it impossible to admit the legitimacy of such procedure or the soundness of such conclusions. Even if the question of light could be isolated from the rest of the case, there was no ground whatever for despairing of sound results being yielded by a careful analysis of the evidence, and, in fact, this was demonstrated by the excellent judgment of the trial judge. On the other hand, the method actually adopted is subject to the most palpable objections and fallacies.

It was suggested by one of the learned counsel for the respondents (in irreconcileable inconsistence with the leading argument) that this proceeding was so remote from regular judicial methods as to constitute an arbitration, and that the result was not appealable. Their Lordships do not think that the appellant is shewn to have done anything to exclude his appeal. In the judgment it is stated that counsel on both sides welcomed the "suggestion," which is thus traced, in its inception, to the bench. But the "suggestion" was "that we should visit the scene of the accident under conditions approximating as closely as possible to those which prevailed when the plaintiff met with his injuries."

Their Lordships do not approve of such a suggestion; but, even if it had been tentatively carried out, it did not necessarily follow that the Court would cast to the winds the legal evidence in the case, and decide on impressions arising on the concerted representation. It would be too strict to hold that it is the duty of counsel, at their peril, to restrain judges within the cursus curiæ, and to insist on their abstaining from experiments which to some may prove too alluring to admit of adherence to legal media concludendi.

Their Lordships will humbly advise His Majesty that the appeal ought to be allowed, the judgment of the appellate Court reversed with costs, and the judgment of Tyabji J. restored. The respondents will pay the costs of the appeal.

Solicitors for appellant : *Payne & Lattey.*

Solicitors for respondents : *White, Borret & Co.*

HAR SHANKAR PARTAB SINGH AND ANOTHER . . . . . } PLAINTIFFS :

AND

LAL RAGHURAJ SINGH . . . . . DEFENDANT.

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April 25, 30; *May* 15.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

C. C. P., s. 13—*Award of Committee of Taluqdars—Res judicata—Adoption—Authority to adopt must be proved.*

Upon an issue whether the defendant in possession of a taluqa had lost title by inheritance thereto by reason of having been validly adopted out of his own family :—

Held, that an award to that effect of a committee of taluqdars in 1867, affirmed by the Financial Commissioner in 1869, was not a decision by a Court within the meaning of s. 13 of the Code of Civil Procedure. Having regard to s. 33 of the Oudh Estates Act, 1869, the committee had no jurisdiction to decide the question of adoption, and its award did not operate as res judicata.

Held, also, that as, owing to lapse of time, no evidence was forthcoming of an authority on the part of the adoptive widow to adopt the defendant as son to her deceased husband, and no evidence of his having been given in adoption by his natural father, no presumption to either effect could be made in the absence of evidence that a valid adoption was likely to have been made and was consistent with the conduct of the parties.

APPEAL from a decree of the above Court (December 16, 1904), reversing a decree of the Subordinate Judge of Partabgarh (May 30, 1904).

The property in dispute was Shamspur, Surajpal, its owner, died intestate and childless on February 21, 1892, and under Act I. of 1869, s. 23, was succeeded by his widow, Thakurain Raghubans Koer. On her death on November 11, 1901, the succession opened to the next heir of Surajpal, who, according to the family pedigree, was his brother, the respondent.

The Revenue Court, by order dated March 19, 1902, directed his name to be entered on the registers as proprietor, and placed him in possession. In consequence, Balbhaddar Singh, the predecessor of the appellants, sued to eject him from a one-fourth share thereof. The plaint alleged that the respondent had been validly adopted as the son of Lal Bisheshar Bakhsh

**Present* : LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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Singh, in consequence of which he ceased to be a son of Ajmir Singh and brother of Surajpal, and that, according to the family pedigree, the plaintiff, the respondent, Lal Chanderpal Singh and Huninat Singh were each entitled to a one-fourth share in the estate. The last-named two persons were added as defendants.

The respondent denied both the factum and validity of the alleged adoption.

It was alleged to have taken place in 1853, and to have been made by Thakurain Baijnath Koer, the widow of Lal Bisheshar Bakhsh Singh. It was not disputed that the natural parents of the respondent died in his infancy, and that he was brought up and supported by Thakurain Baijnath Koer. She died on December 18, 1879. Claims to succeed her in respect of her husband's estate were made in the Revenue Courts by Chatrpal Singh, who asserted that he was her adopted son; by the respondent, who asserted that "the Thakurain brought up and adopted the applicant from his infancy, and she herself performed all the ceremonies, such as marriage, &c., of the applicant. She having constituted the applicant her heir and successor, installed him on the gaddi in 1272 F"; and a third claim was made by Chanderpal Singh. On June 23, 1880, an order was made directing the entry of the respondent's name in the revenue register as owner of the Bargaon estate in succession to Thakurain Baijnath Koer. Thereupon Chatrpal Singh in 1891 sued to recover the said estate; and in defence the respondent denied Chatrpal Singh's adoption, and set up an adoption of himself. Both plaintiff and defendant, being unable to prove any permission to adopt on the part of Thakurain Baijnath Koer's husband, agreed on the pleadings that by custom such permission was not requisite. The suit was dismissed, both the Courts in Oudh finding that Chatrpal Singh had not been adopted, and that the respondent had been adopted by Thakurain Baijnath Koer. On appeal to His Majesty in Council the decision was that Chatrpal Singh's adoption had not been proved, but no opinion was expressed in regard to the adoption of the respondent.

No oral evidence was produced by the plaintiff in the present case. The only evidence of a custom validating an adoption by

a widow without her deceased husband's permission was the admission or agreement above referred to.

The Subordinate Judge decided that the respondent had been in fact adopted, and that his adoption was valid in law. He also held that the respondent was estopped by his conduct from denying the said adoption; and that the question adoption or no adoption was res judicata, inasmuch as the British Indian Association of Oudh, who sat as arbitrators to decide claims for maintenance made against taluqdars, had on December 16, 1867, dismissed a claim made on behalf of the respondent against Surajpal Singh, on the ground that Thakurain Baijnath Koer had adopted him. A decree was made for a one-fourth share of Shamspur.

The Court of the Judicial Commissioner decided that Thakurain Baijnath Koer had not in other than a popular sense adopted the respondent; that the adoption, if made in fact, was invalid in law; that the respondent was not estopped from denying the said adoption; and that the said finding of the British Indian Association did not operate as res judicata.

Ross, for the appellants, contended that the issue as to the adoption of the respondent by Baijnath Kunwar as son to her deceased husband was res judicata within the meaning of s. 13 of the Code of Civil Procedure. It had been disposed of by the British Indian Association of Oudh. That was a body of Oudh taluqdars which decided claims to maintenance, and it had on December 16, 1867, refused a claim to maintenance brought by the respondent against his brother Surajpal on the ground that he had been adopted and thereby removed from the family of Surajpal to that of his adoptive father. The award to that effect was confirmed by the Financial Commissioner. Reference was made to the Oudh Estates Act, 1869, s. 33, as to the effect of this award. Also to ss. 13, 40, 41, 42, and 43 of the Indian Evidence Act and *Collector of Gorakhpur* v. *Palakdhari Singh.* (1)

[SIR A. WILSON. It must be shewn that the British Indian Association had jurisdiction to decide the present issue before you can rely on s. 13.]

(1) (1889) I. L. R. 12 Allah. 1.

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Reference was made to *Bhaiya Ardawan Singh* v. *Raja Udey Partab Singh* (1) and *Muhammad Imam Ali Khan* v. *Sardar Husain Khan*. (2)

Further, the respondent was estopped from denying both the fact and the validity of his adoption by Baijnath. In 1879 he claimed, by virtue of his adoption, to succeed at her death to the estate of her deceased husband. He made good this claim against Partab, who would otherwise have succeeded as the right heir. He is consequently estopped as against Partab and against the plaintiff, who in this suit claimed through him. His general conduct and admissions in various documents in evidence, which he failed to explain in a contrary sense, was consistent with this claim. He in fact repeatedly set up the adoption now sought to be established against him. Even if he were not estopped it was submitted that the onus originally on the appellant to establish the adoption in this suit was thereby shifted to the respondent, who had not disproved either the factum or the validity of his adoption : see *Chandra Kunwar* v. *Narpat Singh*. (3) It was contended, further, that the evidence proved the factum of the adoption by Baijnath, and under the circumstances, and owing to the lapse of time, it must be presumed that the necessary permission or authority no longer capable of proof in that respect had been given to her by her deceased husband : see Mayne's Hindu Law, 7th ed. p. 204.

De Gruyther, for the respondent, contended that his adoption had not been proved. Even if it were shewn that Baijnath had taken him in adoption, that was of no effect without proof of her authority to do so as son to her deceased husband. Of the grant of such authority there was no evidence, and it could not be presumed. The circumstances did not authorize a presumption to that effect and did not create an estoppel. Partab did not contest the respondent's claim in 1879 ; he neither claimed himself as true heir to the last owner nor did he object to the respondent's claim. The respondent's assertions and admissions on some occasions of his alleged adoption were not sufficient to estop him, and, moreover, were counterbalanced by denials upon other occasions.

(1) (1896) L. R. 23 Ind. Ap. 64, 69. 168, 169.
(2) (1898) L. R. 25 Ind. Ap. 161, (3) Ante, pp. 27, 35.

His adoption was alleged or denied by him as suited the occasion. Then, as to res judicata, the award of the association was not the decision of a Court within the meaning of s. 13. It had no jurisdiction to decide the question of adoption in a way which was binding on the parties. It had to deal authoritatively with the claim to maintenance, and if incidentally it had to form an opinion as to the adoption, that opinion had not the force of a binding decision, and could not operate as res judicata. Reference was made to *Gokul Mandar* v. *Pudmanund Singh* (1); *Misir Raghobardial* v. *Sheo Bakhsh Singh* (2); *Chitpal Singh* v. *Bhairon Bakhsh Singh* (3); Sykes' Taluqdari Law, pp. 151, 153; *Raj Bahadoor Singh* v. *Achumbit Lal*. (4)

Ross replied.

The judgment of their Lordships was delivered by

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LORD COLLINS. The appellants, who are the successors in title of the original plaintiff, appeal from a decision of the Court of the Judicial Commissioner of Oudh in favour of the defendant Lal Raghuraj Singh, the present respondent, overruling a decision of the Subordinate Judge of Partabgarh in favour of the plaintiff. The matter in dispute is the right of succession to the Taluqa of Shamspur, and the question for decision is whether or not the respondent was validly adopted as the son of Lal Bisheshar Bakhsh Singh by the widow of the latter, Thakurain Baijnath Kunwar. The suit was brought in the Court of the Subordinate Judge of Partabgarh by Balbhaddar Singh, the predecessor in title of the present appellants. The taluqa in question was granted by sanad to one Lal Surajpal Singh, brother of the respondent, in 1872. Lal Surajpal Singh died childless and intestate on February 21, 1892, and was succeeded by his widow, Thakurain Raghubans Kunwar, who took the estate of a Hindu widow. She died on November 11, 1901. On March 19, 1902, the Assistant Commissioner of Partabgarh caused the name of the respondent to be entered as holder, and he obtained and holds possession. The original plaintiff thereupon claimed as one of four persons

(1) (1902) L. R. 29 Ind. Ap. 196, 202.
(2) (1882) L. R. 9 Ind. Ap. 197.
(3) (1905) I. L. R. 28 Allah. 219.
(4) (1879) L. R. 6 Ind. Ap. 110.

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entitled to succeed on the death of the widow to a fourth share, and sought to oust the respondent by proving that he had been adopted into another family and thus lost the right which would otherwise have been his of succeeding to the property as heir to his natural brother, Lal Surajpal Singh. Hence the importance of the question whether the respondent had been validly adopted out of his own family. There was considerable evidence of conduct on the part of the respondent holding out and asserting, when it suited his purpose to do so, that he had been adopted as the son of Lal Bisheshar Bakhsh Singh, and three issues were formulated and considered by both Courts on this part of the case—

1. Was it res adjudicata ?

2. Was the respondent estopped as against the plaintiff from denying it ?

3. Supposing the plaintiff failed on both these issues, had he proved a valid adoption in fact ?

The Subordinate Judge found all these issues in favour of the plaintiff. The Court of the Judicial Commissioner arrived at the opposite conclusion. It becomes necessary, therefore, to consider each of these questions.

First, as to res adjudicata. The contention of the plaintiff on this point is based upon the award of the Committee of Taluqdars in 1867, affirmed by the Financial Commissioner in 1869. This award was made on a claim for maintenance or for a 4 annas share in the taluqa brought forward by the present respondent against Surajpal Singh. This claim was dismissed on the ground that the applicant (the respondent) had been adopted by Thakurain Baijnath Kunwar and had consequently ceased "to have any interest in the heritage of his natural father." The argument for the appellants on this part of the case was based on s. 13 of the Code of Civil Procedure (Act XIV. of 1882), which provides that "no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a Court of jurisdiction competent to try such subsequent suit or the suit in which such

issue has been subsequently raised and has been heard and finally decided by such Court." He is bound, therefore, to shew that the Committee of Taluqdars formed such a Court, and he relies on s. 33 of the Oudh Estates Act, 1869, as justifying this contention. That section runs thus : "And whereas bodies of taluqdars have in several cases made awards respecting the provision to be made for certain relatives of taluqdars, and it is expedient to render such awards legally enforceable : it is hereby further enacted that every such award shall, if approved by the Financial Commissioner of Oudh and filed in this Court within six months after the passing of this Act, be enforceable as if a Court of competent jurisdiction had passed judgment according to the award and a decree had followed upon such judgment." (1)

It seems quite clear, therefore, that the Committee of Taluqdars was not in any sense a Court, much less a Court with such jurisdiction as is described in s. 13 of the Civil Procedure Code above cited as essential to found an estoppel, and, for the reasons given in the judgment of the additional Judicial Commissioner, their Lordships are of opinion that the committee had no jurisdiction to decide the question of adoption, and the affirmation by the Financial Commissioner of their refusal to award maintenance could not give judicial validity to their decision on a point outside their jurisdiction. Their Lordships therefore concur with the view taken by the Court below on this issue.

Next, as to the question of estoppel. That which is set up is said to arise from the fact that on the death of Thakurain Baijnath Kunwar in 1879 the respondent set up title to succeed her as the adopted son of her husband Bisheshar Bakhsh Singh, and on this footing secured the succession to which Partab Singh, as the nearest heir, would have been entitled but for the respondent's intervention; that the respondent was thus estopped as against Partab from denying the adoption; and that the appellants are now claiming under Partab. Bnt there is no evidence that Partab in any way opposed the respondent's claim; on the contrary, he was living with, and apparently co-operating

(1) See Sykes, p. 282.

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with, the respondent at the time, and consequently the essential elements of an estoppel between these persons are lacking, and even if the appellants were claiming through Partab, they cannot establish an estoppel.

Their Lordships therefore agree with the Court below on this point also.

The remaining question is whether the appellants have established the fact that the respondent was effectually adopted as the son of Lal Bisheshar Bakhsh Singh. To establish this they must prove that, if the adoption was ever formally made at all by Thakurain Baijnath Kunwar, as he alleges, it was made by the direction of her husband, and further that the respondent's father had given him in adoption. Having regard to the length of time which has elapsed since these conditions could have been fulfilled, if they ever were fulfilled, the appellants admit that they cannot prove them, but contend that they ought to be presumed. But to justify such a presumption they ought to establish an initial probability that the adoption was likely to have been validly made, and that the conduct of the parties cognizant of the facts has been at least consistent with such an hypothesis.

It would not be right to repeat here the reasoning by which the Court below have come to the conclusion that, putting aside the statements made by the respondent himself when it suited his purpose, the position of the Thakurain and the necessary consequences to her of the adoption rendered it unlikely that she should have made it ; and that her conduct on crucial occasions was more consistent with the hypothesis that she did not regard him as having been validly adopted than that she did. It is quite clear that no weight can be given to any statements of the respondent, if they fall short of founding an estoppel, as he has asserted or denied the adoption just as it suited his purpose throughout the whole of the protracted litigation between the members of the family. It has been already pointed out that they do not suffice to found an estoppel, and, taking into consideration the rest of the evidence, their Lordships fully concur in the reasoning and the conclusion of the Court below.

Their Lordships will therefore humbly advise His Majesty

that this appeal be dismissed. The appellants will pay the costs of the appeal.

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Solicitors for appellants : *Walker & Rowe.*

Solicitors for respondent : *T. L. Wilson & Co.*

HAR SHANKAR PARTAB SINGH *v.* LAL RAGHURAJ SINGH.

HARI MOHUN MISSER AND OTHERS . . . DEFENDANTS;

AND

SURENDRA NARAYAN SINGH . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

J. C.*

1907

May 3, 15.

Bengal Tenancy Act, s. 23—Building of an Indigo Factory by an Occupancy Raiyat—Practice in Second Appeal—C. C. P., ss. 584 (*a*) *and* 585.

Under the Bengal Tenancy Act, s. 23, an occupancy raiyat may use the land tenanted by him in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy:—

Held, that the District Judge having found as a fact that the building of an indigo factory within the limits of an agricultural holding did not infringe either of the above restrictions, the High Court could not in second appeal, under ss. 584 *(a)* and 585 of the Civil Procedure Code, overrule his judgment except on the ground that it was contrary to some law or usage. It cannot be laid down as law that, without reference to the circumstances of individual cases, the withdrawal of the area actually built upon from agricultural purposes infringes either of the above restrictions.

APPEAL from a decree of the High Court (June 1, 1903) reversing a decree of the District Court of Purnea (August 16, 1900) and restoring a decree of the Subordinate Judge of Purnea (September 30, 1899).

The question decided was whether the respondent was entitled, under the circumstances stated in the judgment of their Lordships, to a perpetual injunction restraining the appellants from erecting certain buildings on a plot of land situate in the village of Badh Manoharpur.

The property which comprised this plot was held jointly by the respondent and the first three appellants, the former being

* *Present* LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

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entitled to a 10½ annas share, the latter to a 3½ annas share, certain defendants not parties to the appeal being entitled to the remaining 2 annas. The sixth appellant was the purchaser of the plot of land in suit, and he entered into an agreement with the first appellant to carry on an indigo business in partnership. With this view they sowed indigo, and began to build a factory on the said plot.

The plaint sought a perpetual injunction, and the defence was that the land in dispute formed a portion of the holding of seventy begahs sold to the sixth appellant on May 25, 1896, that his interest therein was a transferable right of occupancy, and that he had a right in law to erect the disputed buildings on the said land. It was further pleaded that the buildings were erected to the knowledge of the plaintiff and without objection on his part, that any loss occasioned to him could be sufficiently compensated in money, and that no case had been made for the grant of a perpetual injunction and the other relief claimed.

By the findings of the Courts below it was conclusively established that the sixth appellant had a right of occupancy as claimed. The Subordinate Judge decreed as prayed, but the District Judge decided that a tenant having occupancy rights was entitled to grow indigo as a crop if he so wished, and to erect permanent buildings on his holding, provided they were for the benefit of the property and consistent with the purposes for which it was let, and that the building in suit fulfilled both these requisites. The High Court, on the other hand, held that the erection of an indigo factory by an occupancy tenant rendered the land "unfit for the purpose of the tenancy" within the meaning of s. 23 of the Bengal Tenancy Act, and that the finding of the District Judge to the contrary was not a finding of fact with which the High Court were precluded from interfering.

De Gruyther, for the appellants, contended that an occupancy tenant is entitled in law to erect on his land such buildings as are now in dispute. The land was let for agricultural purposes, and the buildings did not render the land unfit for those purposes and did not impair its value. It rather increased that value to the extent of the value of the buildings erected. Reference was

made to the Bengal Tenancy Act (VIII. of 1885), ss. 19, 23, 26, 29, 76, 77, 78, 178, and 183, and to *Nyamuloollah Ostagur* v. *Gobind Churn Dutt.* (1) The buildings were erected with the consent of some co-sharers, and without objection from others. As to the extent of the injunction granted, see Specific Relief Act (I. of 1877), s. 54.

C.W. Arathoon, for the respondent, contended that the buildings in question were wholly inconsistent with the purpose for which the land was let. That purpose was the cultivation of crops. The manufacture of cakes out of indigo plants is not an agricultural purpose. The erection of an indigo factory on the land was calculated to render it unfit for the real purposes of the tenancy. The Bengal Tenancy Act only applied to agricultural tenancies, and s. 76 provided that the use of the land must be consistent with the purpose for which it was let, that is, an agricultural purpose. Reference was made to *Lal Sahoo* v. *Deo Narain Singh* (2); *Ramanadhan* v. *Zamindar of Ramnad* (3); *Venkayya* v. *Ramasami* (4); *Najju Khan* v. *Imtiazuddin* (5); and *Jugut Chunder Roy Chowdhry* v. *Eshan Chunder Banerjee.* (6)

De Gruyther replied.

The judgment of their Lordships was delivered by

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SIR ARTHUR WILSON. The respondent represents the owner of a 10½ annas share in a putni tenure of considerable extent, Turuf Inaitpur Katakose, in the district of Purnea. The putni included, amongst other properties, a holding to which the present suit relates. This holding had become vested in Ram Kumar Singh, who, it is not disputed, held as an occupancy raiyat, enjoying as such the rights conferred upon a tenant of that class by the Bengal Tenancy Act (No. VIII. of 1885). Ram Kumar Singh, in conjunction with some of the owners of shares in the putni, took steps for the purpose of growing indigo on the holding, and for the erection of an indigo factory within its limits.

(1) (1866) 6 S. W. R., Act X., rulings, 40.
(2) (1878) I. L. R. 3 Calc. 781.
(3) (1893) I. L. R. 16 Madr. 407.
(4) (1898) I. L. R. 22 Madr. 39.
(5) (1895) I. L. R. 18 Allah. 115.
(6) (1875) 24 S. W. R. 220.

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The suit out of which this appeal arises was brought in the Court of the Subordinate Judge of Purnea, by the owners of the 10½ annas share in the putni, to obtain an injunction restraining the carrying out of the proposed changes. It is unnecessary to consider the constitution of the suit. It is enough to say that all necessary parties were joined, and that everything turns upon the rights of the 10½ annas sharers in the putni on the one hand, and those of Ram Kumar Singh, the occupancy tenant of the holding, on the other.

The enactment governing the case is s. 23 of the Bengal Tenancy Act, which says: "When a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy."

The Subordinate Judge granted the injunction asked for. The District Judge on appeal reversed that decision. As to the first of the two restrictions contained in the section his finding was explicit. He says: "The building of a factory with necessary appliance for the manufacture of the plant near to or upon the land on which it is grown would be an operation decidedly for the benefit of the holding, and I fail to see how under any conceivable circumstances the value of the holding could deteriorate in consequence of the erection of such buildings."

This is a clear finding of fact, which has not been, and could not be, questioned.

The second restriction in the section is that the user of the land must not be such as to render it unfit for the purposes of the tenancy. The question arising with regard to that restriction was essentially a question of fact, and the District Judge decided it; but in doing so he may seem, perhaps, to have relied, not so much upon the circumstances of the case before him, as upon a proposition which, understood generally, might require qualification, for he says: "I think it may be fairly held that the erection of indigo buildings is also in conformity with the purposes for which an agricultural holding is let."

What their Lordships, however, have to decide is not whether the judgment of the District Judge was wholly satisfactory, but

whether the learned judges of the High Court were justified in overruling it, as they did, on second appeal.

Second appeals are governed, so far as the present case is concerned, by ss. 584 (*a*) and 585 of the Civil Procedure Code, under which the appeal can only lie on the ground of the decision appealed against "being contrary to some specified law or usage having the force of law." The law which the High Court found to have been violated by the District Judge's decision is thus stated: "Where, as in this case, land has been let out for agricultural purposes generally, the erection of an indigo factory on a part of such land must render it unfit for the purpose of the tenancy, because, the purpose of the tenancy being the cultivation of crops, that is agricultural purposes, the portion of the land built upon will evidently be unfit for such purposes."

That proposition of law is laid down broadly, without reference to the circumstances of individual cases, without regard to the size of the holding, or of the area withdrawn from actual cultivation, or to the effect of such withdrawal upon the fitness of the holding, taken as a whole, for profitable cultivation.

Their Lordships are unable to concur in the proposition of law so laid down. They will therefore humbly advise His Majesty that the judgment and decree of the High Court should be discharged with costs, and those of the District Judge restored. The respondent will pay the costs of this appeal.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondent : *Dallimore & Son.*

J. C.* 1907 *April* 23; *May* 15.

ANNADA PERSHAD PANJAR AND OTHERS . DEFENDANTS;

AND

PRASANNAMOYI DASI . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Limitation Act, Sched. II., art. 95—Suit by Darputnidar—Fraud of Benami Holder—Execution Sale of Benami Interest.

A putnidar obtained by fraudulent collusion with a benami darputnidar a decree for sale of the darputni tenure, and himself became the purchaser and dispossessed the true owner.

In a suit by the latter to recover possession and mesne profits brought more than three years after discovery of the fraud :—

Held, that art. 95 of the Limitation Act did not apply, for it was unnecessary to set aside the decree or sale. The defendant could not acquire title from the benamidar, and it was not shewn that the Court directed a sale of anything more than the benami interest. Such a sale in no way affected the plaintiff's title.

APPEAL from a decree of the High Court (May 23, 1904), affirming a decree of the District Judge of Bankura (January 3, 1902).

The suit was brought in February, 1896, in the Court of the Subordinate Judge of Bankura. The plaintiff alleged title as the purchaser of a darputni interest in the property in suit in the name of his son-in-law Sarat Chandra Mandal. It appeared that Raghu Nath Panja, the ancestor of the appellants, as owner of the putni right, sued Sarat Chandra for arrears of rent, obtained a decree, and at a sale thereunder in 1891 bought his darputni interest. The plaint alleged that all Raghu Nath's proceedings connected with this purchase and decree were collusive, illegal and fraudulent, and submitted that, Sarat Chandra being a benamidar, the plaintiff's right had not been affected thereby, and that he was entitled to recover possession. The defendants pleaded limitation, and that, Sarat Chandra's name having been registered, the rent suit and decree were properly brought against him and that the plaintiff was bound thereby.

* *Present* : LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

The Subordinate Judge held that the sale was under the Civil Procedure Code, and passed only the rights of the benamidar, the purchaser taking nothing by the transaction.

The District Judge decided that the suit, being virtually to set aside a sale, was barred by the one-year period of limitation. The High Court set aside this decree and remanded the suit. The District Judge on remand held that art. 95 of the Limitation Act did not apply, and that the plaintiff was entitled to recover within twelve years.

The High Court affirmed this decision.

Sir R. Finlay, K.C., and *C. W. Arathoon*, for the appellants, contended that the suit was barred by art .95 of Act XV. of 1877. It was brought to set aside a decree and sale thereunder on the ground of fraud, more than three years after the fraud was discovered : see also s. 4 of Act XV. of 1877. The decree was valid as it stood, and must be set aside before the plaintiff could recover. It was made against the recorded owner, for the benamidar had in this case been registered as the tenant in the zemindar's books and in the Collector's books. Reference was made to the Bengal Tenancy Act (VIII. of 1885), s. 12, sub-s. 2, s. 170, and s. 188 ; to *Beni Madhub Roy* v. *Jaod Ali Sircar* (1) ; and to s. 280 of the Civil Procedure Code. It was contended that under these circumstances he alone could be recognized as tenant liable for arrears of rent. The decree and sale operated to divest the plaintiff of whatever interest he had in the tenure. It must be presumed that the necessary proceedings under s. 12 of the Bengal Tenancy Act were taken, and that the landlords had notice of the transfer to Sarat Chandra. Under the circumstances, the plaintiff was estopped from denying that a decree against his benamidar and consequent sale of the tenure operated upon the title.

The respondent did not appear.

The judgment of their Lordships was delivered by

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LORD COLLINS. This is an appeal by the defendants from a decision of the High Court of Bengal, affirming the decision of

(1) (1890) I. L. R. 17 Calc. 390.

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the District Judge passed on remand, which had affirmed the decision of the Subordinate Judge. The plaintiff's claim was to recover possession of certain land from the defendants, together with mesne profits. The facts were complicated, and several difficult questions of fact and law arose for decision, but the only question raised before their Lordships on this appeal is whether art. 95 of the Indian Limitation Act, 1877, is a bar to the plaintiff's claim.

The land in question is known as Mehal Arjunbani, and is a putni tenure which was once held by a lady named Damayanti Debi ; she died leaving six daughters, of whom five, acting as executors of their mother's will, of which they had obtained probate, granted a darputni, or underlease, to one Jogendra Nath Singh on May 25, 1885.

On February 8, 1891, the five daughters (the sixth was then dead) sold their putni or superior rights to Raghu Nath Panja, under whom the defendants (the appellants) claim.

Meanwhile, viz., on November 24, 1886, the original plaintiff Dhan Krishna Mandal, had bought from Jogendra Nath Singh his darputni right benami, that is to say, in the name of, his son in-law, Sarat Chandra Mandal, whose name accordingly was entered in the Collector's book as the darputni holder. Though much contested at the trial, it is now formally admitted that in this transaction Sarat Chandra Mandal was merely a *prete-nom* for the plaintiff, Dhan Krishna Mandal, who was the real purchaser and beneficial owner of the interest purchased.

In these circumstances Raghu Nath Panja, being the owner of the putni or superior rights, entered into a fraudulent arrangement with Sarat Chandra Mandal, the nominal holder of the darputni or sub-lessee rights, whereby a collusive judgment was obtained as for rent in arrear, and a sale of the darputni interest of which Sarat Chandra Mandal was the nominal holder was ordered and Raghu Nath Panja allowed to become the purchaser.

This sale took place on June 20, 1891. Dhan Krishna Mandal commenced this suit on October 25, 1895. It is admitted that he had become aware of the fraud which had been practised upon him, on or before July 29, 1892, and, therefore, more than

three years had elapsed between his discovery of the fraud and the commencement of the suit.

By art. 95 of the Indian Limitation Act, 1877, the period of limitation for a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, is three years from the time when the fraud became known to the party wronged. The Courts below have held that the article is not a bar to the action, and the only question on this appeal is whether they are right.

Their Lordships concur in the result arrived at by the Court below. On the facts, as now admitted, Dhan Krishna Mandal was the true owner of the interest in the land which was sold by Jogendra Nath Singh, and nothing that happened between Sarat Chandra Mandal and Raghu Nath Panja could affect his title unless he was estopped from denying the authority of his benamidar to deal with it. On the facts of the case no such estoppel could exist, and, therefore, Raghu Nath Panja could not acquire from Sarat Chandra Mandal more than the latter had to give. Nor has it been proved before their Lordships, any more than it was proved to the satisfaction of the Court below, that the Court purported to direct a sale of anything more than such interest as Sarat Chandra Mandal had in the premises. The onus on this point was on the defendants, who, to make good their defence on the statute, must shew that the plaintiff cannot succeed without setting aside the decree. As pointed out by the officiating District Judge, the sale certificate was in the hands of the defendants, and was not produced. The plaintiff's title, therefore, for anything that appears to the contrary, was in no way affected by the sale under order of the Court, and it is not necessary for him to have the sale set aside. He is entitled to possession of the land from which the defendants have ousted him, but to which they can shew no title, together with mesne profits, from the date of his dispossession, which is all that this suit was brought to procure. Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed. The respondent not having appeared, there will be no order as to costs.

Solicitors for appellants : *T. L. Wilson & Co.*

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AND

Feb. 19; *June* 20. (1.) MURAD BAKHSH AND OTHERS . . . . DEFENDANTS.
(2.) RAMZAN AND OTHERS . . . . . DEFENDANTS.
(3.) ABDUL GHAFUR KHAN AND OTHERS . DEFENDANTS.
(4.) RAJ BAHADUR AND OTHERS . . . . DEFENDANTS.
(5.) SHEORATANGIR AND ANOTHER . . . DEFENDANTS.
(6.) MURAD BAKHSH AND OTHERS . . . . DEFENDANTS.

(SIX CONSOLIDATED APPEALS.)

NOS. 81, 87, 92, 96, 97 AND 101 OF 1903.

AND

RAJAH MUHAMMAD MUMTAZ ALI KHAN. PLAINTIFF;

AND

(1.) SAIYID MUHAMMAD MOHSIN & OTHERS. DEFENDANTS.
(2.) SAIYID ALI AKBAR AND OTHERS . . . DEFENDANTS.

(TWO CONSOLIDATED APPEALS.)

NOS. 84 AND 86 OF 1903.

ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

Law of Oudh—Record of Rights Circular No. 2 of 1861—*Birt Zemindars—Hereditary and Transferable Tenures.*

Where birt zemindars were found in direct engagement with the State at the annexation of Oudh, or had uninterruptedly held whole villages on the terms of their pottahs under the taluqdars, they acquired, under the Record of Rights Circular No. 2 of 1861, on the annexation, absolute under proprietary rights, as against the taluqdar, in those villages.

Ram Autar v. *Muhammad Mumtaz Ali Khan*, (1897) L. R. 24 Ind. Ap. 107, considered.

IN the six consolidated appeals the Court of the Judicial Commissioner (December 19, 1899) in some cases reversed, and in others affirmed, decrees of the Additional Civil Judge of Lucknow.

The question raised in these appeals was whether the

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

respondents hold under-proprietary rights in the villages respectively the subject of the suits brought against them.

The appellant is the taluqdar of the taluqa of Bilaspur, in Oudh, and is now commonly known as the Taluqdar of Atraula. The second summary settlement of the taluqa was made with Rajah Omrao Ali Khan, the grandfather of the appellant; and later a sanad therefor was granted to him. The villages in all the suits are situated within the taluqa. Rajah Omrao Ali Khan died in or about the year 1860, and was succeeded by his son Rajah Riasat Ali Khan. The latter died in the year 1865, and was succeeded by his posthumous son, the appellant. Being a minor, his estate was taken under the management of the Court of Wards, which remained in possession thereof till October 6, 1886, on which date the appellant attained majority.

The regular settlement of the Gonda district, in which all the villages are situated, was made during this period of minority. A very large number of persons, including the respondents or their predecessors in title, claimed under-proprietary rights against the taluqdar, and most of these claims were admitted. That some of the claims were fraudulently admitted by the agents of the Court of Wards has already been established by judgments of their Lordships of the Privy Council. Decrees of the settlement Court were made in favour of the claimants in accordance with the admissions. On attaining majority, the appellant instituted the present suits and many others. The plaints in each case set out the title of the appellant to the village in suit, and that the appellant attained majority on October 6, 1886, when the estate was released from the management of the Court of Wards. It was asserted that the decrees made at the time of the regular settlement were not binding on the appellant, because he was not properly made a party thereto; because the agents of the Court of Wards were not authorized to admit the claims; and because the said admissions were fraudulently and collusively made. It was alleged that, independently of the said decrees, the respondents were not entitled to under-proprietary rights of any sort. The relief sought was the recovery of possession of the villages from the respondents.

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In No. 87 the village was named Dhaurari Dhaurera. The defence was that the defendants held under-proprietary rights under two grants made by Rajah Omrao Ali Khan on September 21, 1848, and January 25, 1850, and that the decree made at regular settlement was binding on the appellant.

The grant, dated September 21, 1848, is in the following terms: "I, Sri Khan-i-Azum Masnad-i-Ali Maharaj Raja Omrao Ali Khan, have executed a birt zemindari in favour of Fakir Baksh Mahton, in respect of village Dhurahra, a nankar estate, in Tappa Bahrampur of Pergunnah Atraula, in the Sarkar of Bahraich, and made over to him sajal, sakat, sapat in chatur siwan (i.e., the rights in water, wood and road within its four boundaries). He is to take possession and occupation of the village with (perfect) composure of mind, and to pay the Government due. He is to take one-fourth share of the Government revenue as right of birt zemindari. The area of the village is fifteen hundred kham (village) bighas."

The grant dated January 25, 1850, is in the same terms, without any reference to the previous grant.

On July 8, 1872, a decree was made by the settlement officer on admission for under-proprietary right therein.

The Additional Civil Judge dismissed the appellant's suit. He decided that the appellant was not properly a party to the suit at settlement; that the admission was not made by any person duly authorized to do so; and that the decree dated July 8, 1872, was not binding on the appellant. He also decided that the defendants did not hold under-proprietary rights in the village. He, however, considered that the suit was barred by limitation. The Judicial Commissioner's Court decided that, as the appellant had not produced the papers given over to him by the Court of Wards, a presumption arose that Salig Ram, the manager of the estate, was duly authorized to confess judgment at settlement. That Court also decided that the respondents were birtdars, and that "A person holding a birt or birt zemindari tenure under which he receives one-fourth or one-tenth of the profits of the village, has a heritable and transferable right in that share." On these findings a decree was made, dismissing the appeal with costs.

In No. 92 the village was named Pachauta, and the litigation followed a course similar to the last.

In No. 96 the village was named Tataspur. In this case, in addition to the defences raised in the other suits, it was pleaded that the appellant had no title, and that his suit was barred. This plea prevailed with the first Court, the appellate Court holding that the appellant was bound by the decree passed at regular settlement, "and that on the merits the respondents as birtias had a heritable and transferable right in the village in suit."

In No. 97 the village was named Gaur, and the defence was as in No. 87, except that no question of limitation was raised.

In cases No. 101 and No. 81 the villages were Chatarpur and Kusahwa respectively, and the litigation was similar to that in No. 87, except that there was the further point that the appellant had ratified the decrees made at regular settlement by accepting rent thereunder.

In the other two consolidated appeals the questions also related to the right of the appellant to recover possession of the villages or to receive a larger proportion of the profits from the respondents. In No. 84 the village was named Belha, and in No. 86 Badalpur Chaukandia. After the annexation of Oudh the first and second summary settlements were made with the respondents or their predecessors in title.

In 1872 the assistant settlement officer, in suits brought on behalf of the appellant, dismissed his claim to superior title, and decreed in each case a malikana of 10 per cent. on the Government revenue.

The Additional Civil Judge found that the villages were not part of the taluqa, that the respondents' ancestors possessed the rights of birt holders prior to and irrespective of the decree of 1872, and were in possession of the property prior to both the summary settlements. The Judicial Commissioner's Court concurred in dismissing the appellant's suits, holding that the decrees at settlement were binding.

The main issue in all the cases was whether the birt tenures were heritable and transferable. Upon this question it will be seen

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that their Lordships adopted the conclusions of the Judicial Commissioner, and also the reasons on which they are based. The judgment, therefore, on this point is given in extenso as delivered in appeal No. 87, the judgments as delivered in the other cases being the same mutatis mutandis.

Referring to the grant in that case as set out above, the learned Judicial Commissioner said :—

"The grant is not an isolated or anomalous grant. It is one made in pursuance of a widespread custom. Similar grants are common in the districts of Gorakhpur, Basti, Gonda, and Bahraich, and probably other sub-montane tracts where large areas of jungle had not been brought under cultivation. Probably the best description of them is to be found in the Gonda Settlement Report.

"The author of the Gonda Settlement Report, after explaining the original structure of Hindu society in its simplest form as consisting of rajah and cultivator, in the north of the district, and its more complex form in the centre of the district, owing to the intervention in the majority of villages of bodies of hereditary birtias between the rajah and the cultivator, proceeds in paragraph 64 to explain the relationship between the rajah and the birtias. In paragraph 72 he states that waste lands were at the rajah's disposal. 'He might cede them on favourable terms to single speculators, who engaged to bring them under cultivation by introducing ploughs themselves. Having once so dealt with them he was bound by rules, which rules will be described when the division of the grain-heap and the position of the birtias are considered.' After detailing the deductions from the grain-heap, the author proceeds—'what is left is divided into two equal heaps, one for the rajah, the other for the cultivator; in local language the rajah's heap is known as hissa sarkari, and in paragraph 83 this or something essentially similar in principle is the method in use all over the districts for land in full cultivation and paying rents in kind. The produce is the common property of every class in the agricultural community from the rajah to the slave. No one is absolute owner, any more than the others, but each has his definite and permanent interest, (paragraph 84) the basis of the whole society being the grain-heap,

in which each constituent rank had its definite interest. There is as yet no trace of private property, whether individual or communal, the rights which bear the nearest resemblance to it being the essentially State rights of the rajah. Independently of the fact that it is still in many places in actual existence, its importance to the administrator lies in its being the original type from which all the different forms of landed property have been derived by processes, which may be easily traced, and whose operation is in most cases going on under our eyes. Its original form is modified by the growth of two institutions within itself, the birtia and the village zemindar; and by the operations of two external causes, the introduction of money into the relations between its various members and the encroachment of a foreign power on the prerogative of the rajah.'

" Paragraph 85.—' Birt means a cession of any part of the rajah's rights within definite limits.'

" Paragraph 86.—' The most important classes of birt were of two kinds, the birt zemindari and the birt jungal tarashi. Of the first kind, I know no instance more than two hundred years old; and by far the greater number were created within the present century, when the rajah granting them was out of possession of the lands to which they referred. So complete is the cession that it is not likely that the comparatively small gratuity, which formed the consideration, would have reconciled the rajah to the loss of his rights, had he been in actual fruition of them. So their existence may really be traced to the operation of the external forces just mentioned. They are most common in Utraula, Sadullanagar, and Burahpara, where the rajah had been longest, and most completely set aside, and in those parganas there is hardly a village where they do not constitute the charter of the present proprietary family. Their terms, which varied very slightly, were as follows: The rajah cedes a certain plot of land, or a village, to a certain grantee. He abandons all his rights in water, in wood, and in roads; the birtia on his part is bound to plough, and bring in ploughs, and the inhabitants are liable for the cash assessed by the nazim or chakladar on the village. In the event of a grain division (as described above) the rights of the birtia extends to one-fourth of

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the rajah's heap—87. In Gonda, Makunpur, and Bhawanipur birts were equally common, but on less favourable terms. The rajahs still retained considerable power, and in Gonda at least must have entertained strong hopes of recovering the whole. The birtias consequently were very seldom invested with the peculiarly zamindari attributes of manorial rights or transit dues, and their zeal in clearing the jungle was stimulated only by the perpetual cession in favour of themselves and their posterity of the old mukuddams' deduction of one-tenth from the rajah's grain-heap.'

"The treatment of the Zamindars by the Mahomedan Government is explained in paragraphs 91 and 92 :—'The dehi nankar, allowed by the Government, usually bore, in the first instance, some definite proportion to the gross assets. In Utraula, for instance, the rights of the birtias were respected, and they were allowed, as they would have been under the rajah, one-fourth of the state assets. This they continued to receive whenever the Government collections were made in grain. It was the general introduction of cash payments for whole villages that modified their position in this respect.'

"Paragraph 97.—'It has been seen that in the original form of the society, money did not enter at all into the relations which subsisted between the purely agricultural classes, nor does it now in the north of the district, except in case of such crops as sugarcane and poppy, whose division is effected with difficulty, and which occupy an infinitesimal proportion of the whole area. It is only in the rich, old cultivation between the Terhi and the Ghagra that money rents have been at all prevalent for a long time. Between the Terhi and the Kawana they are of recent and still partial introduction. They have, however, been for some time in use everywhere, where the nazims collected direct in the lump assessments on whole villages. They were recommended here by their obvious convenience, as it would have been an utter impossibility for any nazim to superintend the grain divisions in every village in his charge. The general result of their introduction was that the revenue ceased to bear a fixed proportion to the total produce. . . . . As the revenue ceased to bear a fixed proportion to the produce, so did the

nankar of the village proprietors, originally a stated share of the revenue, cease to fluctuate also. The same sum as had been originally assessed as their share continued to be remitted in their favour, whatever the lump assessment on the whole village might be.'

"Paragraph 102.—'The general introduction of money payments had converted zemindari receipts from the land into something bearing resemblance to rent, and had undermined the fixity of tenure which was secured under the old system of payments in kind.'

"Paragraph 59 of the Basti Settlement Report shews the form of birt-patr prevalent in that district. It is very similar to the form in use in Gonda. The rajah surrenders water, wood and roads or transit dues within the four boundaries of the village. In the entire birt, half is declared to be revenue-free and half to be the right of Government.

"From paragraph 52 it appears that the settlement was made with the birtias on allowance of 10 per cent. being payable to the over-proprietors.

"In paragraph 59 the settlement officer states: 'With the exception of bansi, therefore, in every pargana there is, or was a landed aristocracy in regular gradation. At its head was the rajah in possession of whatever portion of the original domain had escaped alienation; next his more or less distant cousins and the members of his clan generally with their separate estates; and after them the great body of birtias. "Birt" means the grant of a right in land by the original lord of the soil. . . . . The birt grants sometimes conveyed a full proprietary right, sometimes only a limited and temporary interest in the village. . . . . Land was at first of little value, and rights in large tracts were made over for a nominal consideration or given away without any consideration at all. . . . . But the common and ordinary form of birt merely conferred a limited and subordinate right. The birtias had the entire control of the village, but he was only allowed to retain a definite proportion of the profits, most commonly one-tenth or one-fourth, and was obliged to hand over the rest to the superior proprietor. In such cases the right, though limited, was complete as far as it went. If the rajah, as

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he sometimes did, resumed the control of the village, he allowed the birtias to retain a one-fourth or one-tenth of the land, as the case might be, instead of his general birt right. I have come across several arazi holdings which arose in this way. All the different classes of birtias, as well as most of the mukaddams or managing lessees have been treated as zemindars since 1839, and the settlement has been made with them in full proprietary right, subject in some cases to the payment of a malikana allowance of 10 per cent. to the superior proprietor.'

"Paragraph 194 of the Gorakhpur Settlement Report contains extracts from the Gazetteer, and a form of modern birt, merely stating that the village is assigned in birt and the birtia is to pay the rates payable by birtias in general. The terms are not nearly as precise as the deeds in use in Gondi and Basti.

"Paragraph 194 proceeds: 'The nature and rights of a tenure so common in the district formed the subject of long inquiries and deliberations at each recurring revision of assessment. The chief point was to ascertain whether the birt-holders (birtia or birtias) were or were not proprietors entitled to engage for the revenue. The Government at first took the negative view and directed settlements with the rajahs and taluqdars; but in 1835 the board changed its mind. On the report of the Collector, Mr. Armstrong, it held that the tenure was heritable and transferable, and that the birtias must be considered as proprietors of the villages held by them. Settlement has ever since been made with the birtias themselves, who have thereby become independent of their feudal chieftains. But they must still pay into Government treasury, to be credited to those chieftains, a seigniorial fee (malikana) of 10 per cent. on their revenue.'

"An opinion is expressed that mukaddam birts carrying an allowance of one-tenth of the assets, were merely granted during the pleasure of the grantor. Paragraph 196 contains a further extract from the Gazetteer to the effect that the 'mukaddam' tenure is to all effect a zamindari. Paragraph 197 states that at the cession of the district to the English Government a vast majority of the land was either revenue-free or waste land belonging to Government, and, although the rajahs and grantees owned all the cultivated land paying revenue, yet the cultivation

was arranged for either through the agency of birtias or mukaddams. 'The birtias held or claimed to have their lands under written grants acquired from the rajahs by gift or by a form of purchase. To shew that birt often was a recognized mode of acquiring land with sale and mortgage, an instance is unearthed from the records of 1817, where the Rani of Satasi offers to sell 19,000 bighas cultivable land outright at Rs. 2 per bigha or to give it in birt at R. 1 per bigha, and subject to an annual payment of one-fourth of the produce. The duties of birtias are defined to be to clear and cultivate the land, and to make certain annual payment known as malikana. At the time of the cession of Gorakhpur to the British, most of the revenue-paying land was in the hands of birtias. The whole of Pargana Maghar, the Bansgaon Tahsil, as well as the greater part of Salempur Majhauli, were then the property of birtias.'

"In paragraph 198 the author, having disposed of birtia communities with acknowledged rights, proceeded to the mukaddam class of birt. He considered that this tenure was originally of a non-proprietary character. After some oscillations of policy, the mukaddams were acknowledged by Government as the subordinate proprietors, and engagements were taken from them.

"The Bahraich Settlement Report, referred to at pp. 176-179 of Sykes' Compendium, contains a specimen form of birt deed in force in Bahraich. It contains a provision that the birtia is to get continuously the zamindari dues, whether the village is direct or kham. The taluqdar consented to a sub-settlement decree being passed on that document. The settlement officer described the birt as consisting in the sale of the right to settle on a certain plot of waste and to enjoy all such valuable perquisites as would necessarily result from that occupation. The settlement officer only knew of one instance in the Bahraich district in which the birtia had obtained one-tenth of the gross produce of the village. He considered that the right of management was expressly reserved to the grantor at his option by the terms of the deed.

"It will be apparent from the above quotations that a birt grant was usually made by a person in the position of a Hindu rajah or

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governor as an act of State in sub-montane districts for the purpose of bringing waste lands under cultivation. The grants are analogous to grants made by the British Government under the waste land rules. The necessities of the case demand fixity of tenure. It is inconceivable that any reasonable man would pay large sums of money and spend his labour and capital in reclaiming jungle, if his position were no better than that of a tenant at will. A small minority of Revenue officials was of opinion that the rajah had a right to resume such grants. It was admitted, however, that force was the prevailing element: MacAndrew's Some Revenue Matters, p. 26.

"That was not the view held by the majority of Revenue officials, or by the Government, or by the Legislature; and, indeed, the question of resumption was nothing more than a question as to which of two partners should be the managing partner. It is indisputable that on resumption the birtia would still take his one-quarter share of the rajah's grain-heap. The only difference would be that the rajah would arrange for the cultivation of the village instead of the birtia. The quotations from the Basti and the Gonda Settlement Reports establish this. This is in pursuance of an ancient and invariable custom prevailing all over the North of India by which a proprietor, who is excluded from the management of the village, invariably retains his sir, or nankar, or specified share of the income.

"In one of these appeals (1) there is a strong corroboration of this. On the birtia refusing to pay the sum of rent of Rs. 500 claimed by the rajah, Rajah Umrao Ali Khan, grandfather of Rajah Mumtaz Ali Khan, at once conceded the birtia's right to receive an annual payment of Rs. 125 during the time of his exclusion from the management. These deeds, therefore, indisputably convey a right in perpetuity to the particular share of produce specified therein.

"In the districts of Gorakhpur, Basti, Gonda, and even in Bahraich, notwithstanding the peculiar stipulation in the deeds there current, they have been held to also convey in perpetuity the right to the management of the village. Whole parganas and whole tracts of country in those districts are to this day

(1) That is in No. 92, relating to Pachauta.

held in proprietary and under-proprietary right under these deeds. I may note here an error into which the Court below appears to have fallen. The deeds do not purport to be pattas, or leases. They are correctly described as birt-patrs, or deeds of cession. There can be no doubt that in general the resumption of such tenure was an act of might rather than of right. That is the opinion to which the Government and the Courts have come after long experience over large tracts of country. I have no doubt that that conclusion is a just and true conclusion, and that it is in accordance with the law and customs of the people.

"I hold, therefore, that a person holding a birt or birt zemindari tenure, under which he receives one-fourth or one-tenth of the profits of the village, has a heritable and transferable right in that share, whether excluded from the village management or not. There is in general a presumption that he is also entitled to retain in perpetuity possession and management of the village, though this presumption may be rebutted by the terms of the grant.

"For the rajah, Mr. Lincoln contends that unless the birt-patr contains terms giving a proprietary right in perpetuity, the defendants have not established their case. That, no doubt, is a doctrine of the English law; I do not think that it is applicable to the present case. I do not think it is possible to apply the ideas prevailing in the mind of an English conveyancer to the construction of a document drawn up in the form used by Hindu conveyancers. In the case of *Balkishan Das* v. *W. F. Legge* (1), now in appeal before Her Majesty in Council, the difficulties of applying the rule of English Law to documents drawn up in the Mahomedan form of conveyancing are apparent. Rajah Muhammad Khan was no doubt a Mahomedan. He, however, held the Hindu office of rajah. His grant is in the ancient Hindu form, couched in terms borrowed from the Sanskrit language. In my opinion the document should, under the rule of justice, equity, and good conscience, be construed in accordance with the ideas prevailing among Hindus. In S. C. No. 291, Dr. Howell has discussed at some length the presumptions

(1) (1897) I. L. R. 19 Allah. 434.

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arising in such case. As regards presumptions arising from a grant by a Hindu, he holds that, subject to certain limitations, the presumption is that the grant is in perpetuity. In Selections from Oudh Government Records (Groves), p. 40, the kanungos and zamindars of the Hardoi district expressed their opinion to the settlement officer that a tenant holding a grove might plant new trees in the place of old trees on the principle that what has been given has been given, that is to say, there is a presumption in favour of perpetuity. I hold that a gift of lands made by a birt-patr, even if not containing express words of inheritance, is presumed to carry an estate of inheritance.

"For the rajah, Mr. Lincoln concedes that if their Lordships of the Privy Council, with complete evidence before them, adopt the same view that they adopted in the case of *Ram Autar* v. *Muhammad Mutmaz Ali Khan* (1), with limited evidence before them, then it will follow that a very large number of cases decided by the settlement Courts in Gonda must have been decided on an erroneous principle. Mr. Lincoln's argument comes to this : that officers who were appointed for the sole purpose of studying the history and institutions of the people in order that they might be able to correctly decide their legal rights and who spent years on the spot in close contact with the people in performing this duty, with the conspicuous ability displayed in the Gonda Settlement Report, must have entirely failed to arrive at the truth. I should be unwilling to arrive at such a conclusion. Mr. Lincoln's argument, however, goes further than this. He not only says that the managing and collecting tenure of the whole village cannot have been in perpetuity, but he says that if the rajah resumed the village, the birtias would not even be entitled to retain their right to receive from the rajah one-quarter of the profits, notwithstanding that they might have expended large capital in reclaiming the village from jungle. Mr. Lincoln, therefore, calling in aid doctrines borrowed from the law of England, is compelled to place himself in opposition, not only to the opinions framed by the Government and the Courts in every district in which the birt tenure is known to exist, but also in opposition to the ancient custom of the

(1) L. R. 24 Ind. Ap. 107.

country acknowledged by his client's grandfather in the case of Pachauta in 1861. I cannot accept his views.

"The argument that acceptance by the birtia of leases for a short term is inconsistent with a permanent grant appears to me to be untenable. It is only in recent years that corn rents have been converted into cash rents. The process is not yet complete in Gonda. Under corn rents, leases would not be necessary. Under cash rents, however, re-assessments are necessary after certain periods. These leases for a term were merely intended to assess the cash rent for a few years in lieu of corn rents without in any way infringing on the birtia's permanent right to one-quarter of the rents and profits, which right is distinctly reserved to him by those very leases. Nearly all proprietors and under-proprietors in these provinces are subject to re-assessment at the close of settlement. By signing an agreement to pay a fixed amount for thirty years they do not forfeit their permanent interests in their estates. Sect. 68, clause 2, of the Oudh Rent Act, 1886, lays down that a person having certain rights in a land does not lose them by subsequently taking a theka or mortgage in which his holding is comprised. In my opinion these leases are not inconsistent with a right in perpetuity vested in the birtia. The same view has been held in *Ram Bharos* v. *Lal Achal Ram* (1), following a decision of this Court in Rent Appeal No. 165 of 1890. (2)

"The learned counsel for the rajah strongly contended that the present case was on all fours with that of *Ram Autar* v. *Muhammad Mumtaz Ali Khan.* (3) It is seldom profitable to attempt a close comparison of the facts of different cases. In the present case, the proposed comparison appears to be more than usually unprofitable. In that case Salig Ram, who confessed judgment, was an interested person. In this case it is not shewn that he was personally interested. In that case the muafi statement was not supported by the evidence of the rajah and the patwari and the other persons. In the present case grants have been produced. The purport of them has been fully explained by

(1) Select Division of Board of Revenue, 1891.

(2) *Mahant Gurcharan Bhadi* v. *Shambhu Dat Ram.*

(3) L. R. 24 Ind. Ap. 107.

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reference to works of great authority on the subject. The nature of the grant in that case appears to have been uncertain. In the present case the grant is one of zemindari birt. The evidence in that case was somewhat defective. In the present case some of those defects have been made good. In the present case the statement of Rajah Umrao Ali Khan has been produced, and the respondents have endeavoured to explain the customary incidents of the birt tenure, which does not appear to have been attempted in the case of Ram Autar. The main grounds of decision in the case *Ram Autar* v. *Muhammad Mumtaz Ali Khan* (1) are totally different from the facts of the present case. The cases are clearly distinguishable. The learned counsel for the respondents referred to the authorities cited in Sykes' Compendium, p. 302. He contended that a birt was a cession of rights by purchase, and that it was not a lease of property. He contended that if any doubt existed as to the grant being one in perpetuity, the fact that one descent had been shewn from Fakir Bakhsh to Rajai would establish the perpetual character of the grant. He further contended that Act XXVI. of 1866 was not exhaustive; that it applied only to the case of zemindars entitled in their own right whose villages had in some manner become included in a 'taluqa.' He contended that the Act did not apply at all to the case of a grant by a taluqdar, where the grantee had continued in possession from the date of the grant. He cited the case of *Sri Maharajah Drig Bijai Singh* v. *Gopal Dat Pandey*. (2)

"The appellant, on the other hand, contended that the defendants must bring their case within Act XXVI. of 1866. On the authority of the case of the widow of *Shankar Sahai* v. *Raja Kashi Parshad* (3) I hold that Act XXVI. of 1866 is not exhaustive. The rules referred to in the Act do not appear to me to be intended to cover the case of persons claiming by grant from the taluqdar. I hold that a right to sub-settlement can be proved otherwise than under Act XXVI. of 1866.

"The respondents have established their right to hold the village under grant from the taluqdar as their heritable and

(1) L. R. 24 Ind. Ap. 107, 114. (2) (1879) L. R. 7 Ind. Ap. 17.
(3) (1876) L. R. 4 Ind. Ap. 198.

transferable estate. The estate has made one descent from Fakir Bakhsh to Rajai, and the respondents have established their possession from the time of the grant till the first summary settlement."

De Gruyther, for the appellant, contended that the respondents had not proved any right to a heritable and transferable interest in the villages in suit as against the taluqdar. The grant of a birt-patta did not of itself import a heritable estate. He referred to *Muhammad Mumtaz Ali Khan* v. *Sheoratangir* (1); *Ram Autar* v. *Rajah Muhammad Mumtaz Ali Khan*. (2) He referred to the decrees by the settlement Court, and submitted that the appellant was not bound by them. He was a minor at the time and was not properly represented before the Court. With regard to these tenures having already passed by inheritance, he submitted that that was during the minority of the appellant, and that consequently no inference should be drawn therefrom that the estate was heritable: see *Gowri Shunker* v. *Maharajah of Bulrampore*. (3) He referred to the temporary leases granted in the cases, and contended that these would have been unnecessary if the respondents held absolute tenures. He referred also to the Record of Rights Circular No. 2 of 1861, as quoted by Sykes, p. 174, and by Sir J. Colvile in L. R. 6 Ind. Ap. 155 et seq.

Cowell, for the respondents in all the cases except No. 96, was not heard.

APPEALS Nos. 81, 87, 92, 96, 97, AND 101 OF 1903.

The judgment of their Lordships was delivered by

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SIR ANDREW SCOBLE. In the six cases out of which these consolidated appeals have arisen, the plaintiff was Rajah Muhammad Mumtaz Ali Khan, the Taluqdar of Atraula, and the defendants were persons who, either by themselves or their predecessors in title, claimed under-proprietary rights in villages in his taluqa. These rights are what are known in Oudh as birt, or birt zemindari right; and the question for decision is whether

(1) L. R. 23 Ind. Ap. 75, 82. (2) L. R. 24 Ind. Ap. 107, 114.
(3) (1878) L. R. 6 Ind. Ap. 1.

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persons holding under this tenure have a heritable and transferable right, as against the taluqdar, in the villages in respect of which the birt has been created.

In Mr. Sykes' valuable Compendium of the Law specially relating to the Talukdars of Oudh (p. 173) it is stated that "there are several descriptions of birt known in Oudh, but . . . . the true birt is that known as the bai birt, created by the talukdar or proprietor for money paid." In the Gonda Settlement Report —and the cases now under appeal come from that district—the bai birt is spoken of as birt zemindari.

In the circular known as the Record of Rights Circular No. 2 of 1861, the Chief Commissioner of Oudh deals very fully with the subject of birt tenures, and lays down the policy of the Government in regard to them. "Birts," he says, "were given for whole mauzas, or patches of land in mauzas. . . . . These tenures, when granted by the talukdar for money received, will be maintained as representing the proprietary rights of the birtias who by purchase have acquired the position of intermediate holders, and as constituting the portion of the profits left them by the talukdar. . . . . Birts of entire mauzas are very common in Gonda and Gorruckpore. They originated in purchases from needy talukdars, and sometimes in clearing leases of jungle land. In the Ootrowla (Atraula) and Bubnee pergunnahs of the Gonda district, the birtias had been in many instances admitted to direct engagements with the native Government for years previous to annexation, and, of course, were settled with them, and should have been at the late summary settlement, on the principle that we are not bound to restore to the talukdars what they had lost before our rule commenced" (Sykes, p. 174).

And the policy of the Government is thus declared: "The Chief Commissioner is clearly of opinion that the birtias who were found in direct engagement with the State at annexation, or who have uninterruptedly held whole villages on the terms of their pottahs under the talukdars, must be maintained in the full enjoyment of their rights, in subordination to the talukdars."

It appears to their Lordships that, if the respondents in these

cases have shewn themselves to come within the benefit of the policy announced in this circular, they acquired, upon the annexation of Oudh by the British Government, absolute under-proprietary rights as against the taluqdar in the villages in suit. The learned Judicial Commissioner, Mr. Blennerhassett, in a series of very able and careful judgments, has decided in their favour, and their Lordships entirely accept his conclusions, and the reasons on which they are based. They will humbly advise His Majesty that these appeals ought to be dismissed, and the decrees of the Court of the Judicial Commissioner confirmed. The appellant must pay to the respondents who appeared one set of their costs of the appeals.

APPEALS NOS. 84 AND 86 OF 1903.

The decision in these appeals follows that in the six cases already disposed of. It may be noted that, in these two cases, the relation of the birtias to the taluqdar was fixed by orders of the Settlement Court as long ago as 1872. These orders were not made by consent, but after examination of witnesses and hearing all parties. Moreover, it would seem from the judgment of the Judicial Commissioner that he would have had "no difficulty in finding" that the respondents or their predecessors in title held "direct under native rule, and after annexation," and that the taluqdar is only entitled to a malikana allowance.

Their Lordships will humbly advise His Majesty that these appeals ought to be dismissed, and the decrees of the Court of the Judicial Commissioner confirmed. The appellant must pay the costs of the appeals.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents in Nos. 87 and 92 : *Barrow, Rogers & Nevill.*

Solicitors for respondents in all the other cases except No. 96 : *Dalbiac, Dyer & Co.*

J. C.* NABAKUMARI DEBI . . . . . DEFENDANT;

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AND

April 23; *June* 5. BEHARI LAL SEN AND OTHERS . . . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Presumption of permanent Grant—Effect of New Pottah on the Transfer of Grant—Assent of the Landlord to Transfer.

Where the presumption arises that the land in dispute is the subject of a permanent grant, it is not displaced by shewing that on two occasions of its transfer there had been a stipulation in the transferring kobalas that the transferee should take a new pottah in his own name from the landlord.

The assent of the landlord to these transfers is sufficiently proved if the dakhilas granted by him describe the rent as paid by the holder in his character of occupier of the holding, notwithstanding that they do not expressly describe him as tenant.

APPEAL by special leave from a decree of the High Court (May 20, 1904), affirming a decree of the Subordinate Judge, Second Court of Zillah, Twenty-four Pergunnahs (March 26, 1902).

The suit was brought in 1900 for the ejectment of the appellant from her holding of the property in suit on the ground that she was a mere tenant at will. The defence was (inter alia) that the tenure was a permanent tenure, and that the appellant was not liable to ejectment.

The Subordinate Judge held that the tenure was not a permanent, but a precarious, tenure, principally basing his opinion on the grants of new pottahs by the landlord, which the evidence shewed had followed upon various transfers of the property in former years. He was of opinion that the facts disclosed were not sufficient to warrant the inference that the tenancy was, when first created, intended to be permanent, or was subsequently, by implied agreement, converted into a permanent one, and this opinion he formed "granting that the holding is sold and transferable, and its rent fixed."

The High Court, moreover, referring to two of these transfers

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

in 1822 and 1859, and to the two sale deeds then executed by the holders of the land in favour of the purchasers, says that each of them "expressly recites that transferee, on paying the expenses, &c., of the maharajah and on causing the expunction of the transferer's name, shall take a pottah in his own name. If the tenancy was of a permanent nature, there would be no necessity for such a clause in either of the deeds, and the insertion of this clause is against the presumption that the land in dispute is the subject of a permanent grant."

If further says: "There is no settled rule laid down in any case shewn to us which is to the effect that long possession of holding upwards of eighty years necessarily implies the permanency of the tenancy."

Leave to appeal was refused by the High Court, on the ground that the property was of less value than Rs. 10,000; the Chief Justice adding that the judgment appeared to clash with certain decisions of the High Court, and more especially with two recent decisions of the Judicial Committee, where the same sort of question was involved.

Special leave to appeal was granted, the said two decisions, reported in L. R. 31 Ind. Ap. pp. 144 and 149, being referred to, and it being submitted that there had been a miscarriage of justice caused by the Courts in India misunderstanding the legal effect of a mutation pottah and the legal inferences from the ascertained facts.

C. W. Arathoon and *De Gruyther*, for the appellant, contended that the evidence proved a permanent tenure, otherwise that the presumption to that effect was not displaced by the grant of pottahs as held by the Courts below. Reference was made to *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1); *Nilratan Mandal* v. *Ismail Khan Mahomed* (2); *Lala Beni Ram* v. *Kundal Lal* (3); *Ismail Khan Mahomed* v. *Joygoon Bibi* (4); *Casperz* v. *Kedarnath Sarbodikari* (5); *Ramchunder Dutt* v. *Jugheschunder Dutt*. (6)

The respondents did not appear.

(1) (1904) L. R. 31 Ind. Ap. 144.
(2) (1904) L. R. 31 Ind. Ap. 149.
(3) (1899) 3 Calc. W. N. 502.
(4) (1900) 4 Calc. W. N. 210.
(5) (1901) 5 Calc. W. N. 859.
(6) (1873) 12 Beng. L. R. 229.

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NABAKUMARI DEBI v. BEHARI LAL SEN.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. The suit out of which this appeal arises was brought by a landlord against his tenant to eject the tenant, on the ground that the latter was a mere tenant at will. The defence was that the tenant held a tenure of a permanent character and was not liable to be evicted at will. The sole question on this appeal is which of these views is correct.

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The Subordinate Judge, Second Court, of the Twenty-four Pergunnahs, who tried the case, gave a decree in favour of the plaintiff, who is now represented by the respondent; and the High Court supported that decision. Hence the present appeal.

There is no question that the tenure or holding, whatever may be its nature, had been in existence for about eighty years, and probably much more, when the suit was instituted. The rent was an almost nominal one, and had never been enhanced, though the value of the holding, as measured by its sale price had greatly increased. It had been sold again and again by kobalas purporting to convey an absolute interest; it had passed by will. And the rent had been accepted from the new tenants after such devolutions.

From these facts only one inference seems possible, namely that the tenant held a permanent tenure. But the Courts in India held that that inference was excluded, on two grounds. The first may be conveniently stated in the words of the learned judges of the High Court: "It appears to us that there are documents which are inconsistent with the hypothesis that the tenancy of the defendant is of a permanent nature. These documents are the two kobalas filed in this case, executed by tenants in possession of the land in favour of their successors. Now, in both these kobalas the transferer conveys the land to the transferee, but expressly recites that the transferee, on paying the expenses, &c., of the Maharajah Bahadur and on causing the expunction of the transferer's name, shall take a pottah in his own name. If the tenancy was of a permanent nature there would be no necessity for such a clause in either of the deeds, and the insertion of this clause in both deeds is against the presumption that the land in dispute is the subject of a permanent grant."

The view there expressed as to the effect of taking a new pottah is inconsistent with the decisions of this Board in *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1) and *Nilratan Mandal* v. *Ismail Khan Mahomed* (2), which decisions again were in accordance with the law laid down in the earlier case of *Ramchunder Dutt* v. *Jugheschunder Dutt.* (3)

The second ground upon which it was said that the tenure was not a permanent one was that the landlord had not been proved to have assented to the several transfers of the holding.

The assent relied upon was the receipt of the rent of the holding from the transferees in their own names. The reason given by the High Court for holding this to be insufficient is that they think the dakhilas acknowledging such receipts, when critically examined, do not expressly describe the transferee as tenant of the holding. That observation may be assumed to be correct. But the dakhilas do describe the rent paid as the rent of the holding, and the person paying as occupier of the holding, and as paying on her own account. Their Lordships think that is quite a sufficient recognition of the transferee as tenant.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, the decrees of both Courts in India discharged, and the suit dismissed with costs in all Courts. The respondents will pay the costs of this appeal.

Solicitors for appellant : *T. L. Wilson & Co.*

(1) L. R. 31 Ind. Ap. 144. (2) L. R. 31 Ind. Ap. 149.
(3) 12 Beng. L. R. 229, at p. 235.

J. C.* 1907 April 23.

DHANUKDHARI SINGH & ANOTHER. JUDGMENT DEBTORS;

AND

MAHABIR PERSHAD SINGH AND ANOTHER . . . . . } DECREE HOLDERS.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Practice—New Point—Appeal not Entertained on Finding of Fact not Questioned in Court below.

The appellants having omitted in their appeal to the High Court to question the finding of the First Court in execution proceedings that they had waived the irregularity of an under-estimate of value in the sale proclamation, were *held* to be precluded from questioning that finding of fact in the appeal before their Lordships.

APPEAL from an order of the High Court (June 17, 1904), reversing an order of the Subordinate Judge of Gya (March 31, 1903), which set aside the auction sale in suit.

On June 11, 1901, the respondents obtained a decree under a mortgage bond against the appellants. An execution sale was fixed by proclamation for May 19, 1902, but a consent order was made on that day for postponement for seven days, and afterwards till July 21, when, according to the appellants' petition therefor, it would be held "without issuing fresh proclamation," petitioners "to have no right to raise any objection on the ground of irregularity or inadequacy of price." A further postponement was also consented to till September 22, and afterwards till November 24, on the same terms; and on November 25 a sale to the respondents, who had obtained leave to bid, was effected for Rs. 18,500.

On December 20, 1902, the appellants petitioned to set the sale aside, stating the value of the property to be Rs. 85,000, and alleging the invalidity of the sale on the ground that the dates of sale were fixed without specifying the hour of sale as directed by s. 291 of the Civil Procedure Code, and for other irregularities.

The Subordinate Judge found that certain of the alleged irregularities were covered by the waiver contained in the appellants' applications for postponement, but that two were not

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

so covered. One of these was that the application for postponement of sale of July 21, 1902, was filed by one of the two judgment debtors, and contained no waiver at all, and therefore the property could not be sold on September 22, 1902, without the issue of a fresh proclamation. The other was as to the non-specification of the hour of sale. The judge referred to a decision in *Bhibari Misra* v. *Rani Surjamoni Pat Maha Dai* (1), which, he stated, laid down that the non-specification of the hour was a material irregularity, and that in the case of proved substantial injury, it must be presumed that the injury resulted directly from the non-specification of the hour, and he held, in accordance with that ruling, that the judgment debtors did not waive their right to object on the ground of this material irregularity. He also found that the property was worth Rs. 35,000, and that the under-valuation by the respondents at Rs. 15,000 in their application for sale was an irregularity which had been waived.

The High Court, in a judgment reported in I.L.R. 31 Calc. 815, said that the arguments before them had centred on the point as to the non-mention of the hour of sale. They referred to three decisions of the Judicial Committee of the Privy Council (L.R. 10 Ind. Ap. p. 25, L.R. 15 Ind. Ap. p. 171, and L.R. 20 Ind. Ap. p. 176), and said : " Those decisions would appear to have held that there should be direct evidence connecting an alleged material irregularity in the publication or conduct of a sale with the inadequacy of price at such a sale as cause and effect in order to enable the Court to set aside the sale " ; and that the decision in I. L. R. 18 Allah. p. 37, is to the same effect. They decided that " it is clear that there must be evidence of circumstances which will warrant the necessary or at least reasonable inference that the inadequacy of price at the sale was the result of the irregularity complained of."

Kenworthy Brown, for the appellants, submitted that the order of the High Court should be reversed. Both Courts had held that the property had been sold for little more than half its real value. There was grave irregularity in the proclamation for

(1) (1901) 6 Calc. W. N. 48.

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sale placing such a low valuation as Rs. 15,000 on the property. It could not have been so alleged in good faith, and the irregularity was not one which could be waived, or which, on the evidence, had in fact been waived: see ss. 287, 290, 291 and 311 of the Civil Procedure Code, and *Saadatmand Khan* v. *Phul Kuar*. (1)

C. W. Arathoon, for the respondent, contended that this issue as to waiver had been disposed of by the Subordinate Judge on the evidence against the appellants, who had not appealed therefrom to the High Court. The only point taken before the High Court was the omission to specify the hour of sale. They had acquiesced before that Court in the finding that the objection now relied on had been waived, and were not entitled to take in appeal that which had become by reason of their own omission a new point.

K. Brown replied.

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April 23.

The judgment of their Lordships was delivered by

LORD ROBERTSON. Their Lordships are confronted with this objection to the appeal, that the argument offered to them is on a question of fact—namely, that of waiver—which was decided adversely to the present appellants in the Court of the Subordinate Judge, and was not submitted for review to the High Court in Calcutta. Accordingly it is out of their Lordships' power to entertain the ground of appeal, it being one of fact which has not been subject to the consideration of the Court below.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of it.

Solicitor for appellants: *The Solicitor, India Office.*

Solicitors for respondent: *T. L. Wilson & Co.*

(1) (1898) L. R. 25 Ind. Ap. 146.

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SAIBOO AND OTHERS . . . . . DEFENDANTS. *April* 30; *May* 1, 2, 3; *July* 3.

ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.

Mahomedan Law—Mushaa—Undivided Shares in Land—Shares in Companies —Validity of Gift.

Assuming that the law of mushaa, which prohibits gifts of undivided shares of divisible property, applies to the succession of Mahomedans who reside in Rangoon, it does not apply to a gift by will of undivided shares in freehold land and of shares in companies.

Mumtaz Ahmad v. *Zubaida Jan*, (1889) L. R. 16 Ind. Ap. 205, followed.

Concurrent findings that deeds of gift were not executed by the donor under pressure of the sense of imminent death upheld and approved.

APPEAL from two decrees of the Chief Court of Lower Burma (May 30, 1904), affirming two decrees (July 22, 1903) of Chitty J., sitting on the original side of the said Court, and dismissing the appellant's suits.

The first suit was brought by Ibrahim Goolam Ariff, as executor of the will of his father, Goolam Ariff, against his two surviving widows and five minor children, and also against the Goolam Ariff Estate Company, to set aside seven deeds of gift, dated April 2, 1902, by the deceased to his widows and minor children, the first seven respondents, and also to set aside a deed of conveyance and assignment, dated May 3, 1902, by which the deceased, the two widows, and the five minor children, Hashim Cassim Patail being their guardian, assigned certain property (shares in which had been granted by the deeds of gift aforesaid) to the said company in return for shares in the same.

The third suit (the second of the three suits not being the subject of this appeal) was instituted by the same plaintiff in the same capacity of executor against three minor sons of the deceased (the third, fourth, and fifth respondents in the first suit) to set aside four deeds of gift, dated April 2, 1902, by which the deceased conveyed undivided shares in certain lands and

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buildings in Rangoon, including a certain freehold house and land, No. 47, Merchant Street, Rangoon, with the furniture therein, in certain proportions set out in the deeds aforesaid to his said three minor sons.

The appellant alleged in his plaint in the first suit, so far as is now material, that the conveyances purporting to be effected by the seven instruments of April 2, 1902, and by the instrument of May 3, 1902, were pretended conveyances, whereby Goolam Ariff attempted to defeat the provisions of the Mahomedan law of succession, and were void and of no effect, and that therefore all the properties to which they related were divisible among the heirs of the deceased according to Mahomedan law. It was also alleged that the said instruments were invalid in that—

(*a*) At the time of their execution Goolam Ariff, who died on May 16, 1902, was in his death-illness, and therefore the gifts purporting to be made by the said instruments were death-bed gifts, and as such invalid by Mahomedan law ;

(*b*) The instrument of May 3, 1902, was invalid, as being made without consideration.

Chitty J., in his judgment, said that the appellant had based his objections to the validity of the whole scheme of gifts and transfers as having been made for the purpose of defeating the Mahomedan law on three grounds—

(*a*) That the gifts are void as being death-bed gifts ;
(*b*) That none of the gifts were completed by delivery ;
(*c*) That such gifts contravene the provisions of Mahomedan law, as being " hiba-bil-mushaa," or gifts of joint undivided properties, which are partible in their nature, and which are in some cases invalid by Hanafi law.

Before dealing with these in detail the learned judge held that the law applicable to the case was the Mahomedan law as to gifts. As to (*a*) the learned judge referred to various ancient and modern authorities on Mahomedan law as to the legal signification and essential elements of " death-illness," and in particular cited the following passage from the judgment of the High Court of Calcutta in *Hassarat Bibi* v. *Golam Jaffar* (1) : " A careful study of the principles enunciated in the most authoritative Hanafi

(1) (1898) 3 Calc. W. N. 57.

works would shew that in determining whether the donation of a person suffering from a mortal illness comes within the doctrine applicable to marz-ul-mout (or death-bed) gifts, several questions have to be considered, namely : (1.) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death ? (2.) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death ? (3.) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations or standing up for prayers—a circumstance which might create in the mind of the sufferer an apprehension of death ? (4.) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady ? The limit of one year mentioned in the law books does not in our opinion lay down any hard and fast rule regarding the character of the illness ; it only indicates that a continuance of the malady for that length of time may be regarded as taking it out of the category of a mortal illness." Taking this as the basis of investigation, the learned judge examined the evidence on this point. He rejected most of the evidence of the non-medical witnesses in regard to Goolam Ariff's health on the ground that many of them were obviously biassed, and he relied chiefly on the medical evidence. As to this the learned judge said, " The evidence leaves no doubt whatever on my mind that death was sudden and unexpected " ; and also, " Taking the whole evidence on the question of death-illness into consideration, I am of opinion that it has not been shewn that Goolam Arift was suffering at the time of making these gifts, or any of them, from a disease which was the immediate cause of his death ; or that he was suffering from a disease of such a nature as to induce in him a belief that death would be caused thereby. His illness was not until after the date of the gifts such as to incapacitate him from the pursuit of his ordinary avocations, or from moving about the town to transact such business as he might have on hand. For these reasons I hold that none of the gifts can be said to have been made while Goolam Arift was suffering from his death-illness, and that there

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is no reason to set them aside on that account." He believed death was caused suddenly by the bursting of a blood-vessel, and probably of one in the stomach, but there was no evidence to shew to what that bursting was due.

As to (*b*) and (*c*) (invalid delivery and mushaa), the learned judge said that they could be conveniently taken together, but as the gifts comprised two classes of property, movable and immovable, which stand on a different footing, they should be considered separately. He stated the rules of Mahomedan law as to mushaa to be : (1.) The gift of mushaa in what does admit of partition is not lawful. (2.) Such a gift is not void, but invalid, and even if invalid, possession taken under it transfers the property : See *Mumtaz Ahmad* v. *Zubaida Jan.* (1) (3.) Actual possession not necessary ; the authority to take possession is sufficient : see Ameer Ali, 1, 75. (4.) No actual transfer of possession is necessary in the case of a house given by a husband to a wife, or property given by a father to his minor child : see *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (2) ; *Mohinudin* v. *Manchershah.* (3) As to the movable property—the shares in the public companies—the learned judge said it was suggested that Goolam Ariff might have divided up the shares among the donees ; but as a fact he did not do so, but gave each so many 2000th parts in each and every share, but as a share in a company is property not capable of partition, the shares were therefore not subject to the doctrine of mushaa. In regard to their valid transfer and the completeness of their delivery, he said that Goolam Ariff indorsed over all the share certificates to the Goolam Ariff Estate Company and sent the deeds and certificates for registration to the offices of the several companies which were not situate in his own office ; and that, having done this, he had done all that was incumbent on him to do. Further, that in three of the companies, viz., the Surati Bazaar Company, the Kimmendine Company, and the Iron Bazaar Company, the transfers were accepted by the directors and duly registered, in two others, the Poozoodaung and Bogalay Companies, the directors indorsed the share certificates with the fact of transfer and thereby accepted

(1) L. R. 16 Ind. Ap. 205. (2) (1875) L. R. 2 Ind. Ap. 87.
(3) (1882) I. L. R. 6 Bomb. 650.

and allowed the transfers, and in the one remaining company the directors did not refuse to register the transfer, but only omitted to do so. Under these circumstances he held that Goolam Ariff, if he were alive, could compel the directors of the last three companies to rectify their registers and insert the name of the Goolam Ariff Estate Company as holder of the shares, and, though it had been argued that no formal application for transfer had been made to the several directors as provided by the articles of association of their respective companies, yet the evidence shewed clearly that no such application is usually made, but that the course generally followed was that adopted by Goolam Ariff.

The learned judge then dealt with the immovable property. He said that, though it might be argued with reason that the doctrine of mushaa applied, as immovable properties are capable of partition, yet " the doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules ": *Mahomed Mumtaz Ahmad* v. *Zubaida Jan.* (1) " Applying those rules as set out in the previous paragraph, there would seem to be no question that the gifts to the minor children on April 2, 1902, were valid and that Goolam Ariff held as trustee for them, no actual transfer of possession being necessary. The minors' property vested in Hashim Cassim Patail (their guardian), who was appointed by order of the Court, and the latter was therefore competent to convey it, as in fact he did, to the Goolam Ariff Estate Company. The gifts to the two widows stood on a similar footing. In any case the joint conveyance on May 3, 1902, by all parties, including Goolam Ariff himself, conveyed the property to that company, which, in law, is one person, and therefore the doctrine of mushaa does not apply. As to both classes of property there was complete transfer of possession, and therefore the doctrine had no application on this ground also.

In the third suit the learned judge remarked, as to the deeds of gift the subject thereof, that his rulings in the first suit applied with equal force to them. As to the house, the subject of one of them, even more formal possession had been given than was the case with the shares of immovable properties in the first

(1) I.. R. 16 Ind. Ap. at p. 215.

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suit ; for rents were actually collected on behalf of the infants, and Goolam Ariff had agreed to become a tenant at a fixed rent.

In appeal the Chief Court held that the Court below was right in holding that the validity of the gifts in question must be determined by Mahomedan law only.

As to the question of fact whether Goolam Arift was in his death-illness when he made the gifts (there being no question as to his mental capacity), the Court held that the learned judge was correct in basing his decision mainly on the medical evidence, and, as he had had the advantage of seeing and hearing the witnesses, they adopted without further question the view he had taken of the value of the testimony of the non-medical witnesses. Having regard to the medical evidence and the actual doings and movements of Goolam Ariff, which were beyond dispute, they held that Goolam Arift was not in his death-illness as defined by the Mahomedan law at the time of the execution of the instruments of April 2, 1902, and May 3, 1902. After reviewing the authorities on marz-ul-mout (or death-bed illness), Bigge J., who delivered the principal judgment, said : "So I would put it that the term applies to a gift made under the pressure of the sense of the imminence of death." And further he said : "As with the evidence of the other doctors, marz-ul-mout is not in any way established by the evidence of Colonel Frenchman and Colonel Davis, and I think that the learned judge, after an exhaustive review of the medical and other evidence, came to a very sound and satisfactory conclusion on the point." The Chief Justice, after observing, "It is not disputed that a Mahomedan of the Sunni sect, as was Goolam Ariff, may make gifts of all or any part of his property during his lifetime, even though the effect may be to defeat the Mahomedan law of succession," said that, in view of the conflict of testimony and of the nature of the evidence of friends and relations as to the health of Goolam Ariff, "reliance must be placed exclusively on the medical evidence on this point," and, added the Chief Justice, "There is abundance of it. . . . . I agree that when he executed the deeds of gift Goolam Arift was not under the apprehension that his sickness would have

a fatal issue. The doctors who examined and attended him did not expect that his illness would terminate fatally. . . . As a matter of fact, as has been found by the Court of first instance, it is not proved that Goolam Arift died from any of his diseases. If he did not die from them, but from the bursting of a blood-vessel which had not been foreseen or expected, it does not seem possible to hold that he was in his death-illness when he executed the deeds of gift. Whichever test may be applied, I concur in holding that the gifts were not invalid because they were made when the donor was in his death-illness. I think it is clear that they were not so made."

With regard to delivery of possession, the Court held that this was one of the exceptions to the ordinary rule of Mahomedan law in which delivery of possession was not necessary in that it was a gift by husband and father to wives and children. It referred to *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*. (1)

On the question of the alleged invalidity of the gifts by reason of the doctrine of mushaa, both learned judges pointed out that the tendency of judicial decisions has been to restrict the application of this doctrine within the narrowest limits. They referred especially to *Mumtaz Ahmad* v. *Zubaida Jan* (2), citing the following passage from their Lordships' judgment in that case : " The authorities referred to shew that possession taken under an invalid gift of mushaa transfers the property according to the doctrines of both the Shia and the Sunni schools. The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society and ought to be confined within the strictest rules." They also described the rule as being " that the gift of an undivided part in property capable of partition is invalid " ; but both judges held that the estate, regarded as a whole, was not capable of division, the Chief Justice observing : " The shares in companies taken together were incapable of division, and so I think was the immovable property, even if it be held that any individual house could be divided, which seems to me open to question." As to the intention of the deceased, he remarked : " The subject-matter of the gifts in the present cases consisted of undivided

(1) L. R. 2 Ind. Ap. 87.
(2) L. R 16 Ind. Ap. 205.

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parts of a large number of shares in six companies, and of nineteen pieces of land and the buildings standing thereon. The wish of the donor was not to give to each of the donees property of a certain value. If that had been his desire he could have given a definite number of shares to one, specific immovable property to another, and so on. But what he desired to do was to give to each of the donees a specific share in his whole estate (or the greater part of it)." Hence both judges held that the doctrine of mushaa was not applicable to this property, it being impartible or indivisible; but they held, further, that even if the property were capable of a partition, and that the doctrine did apply, it ceased to be applicable either where transfer of possession had taken place or where the gift was of such a nature that delivery of possession was not necessary.

C. M. Bailhache and *H. G. Snowdon*, for the appellant, contended that the deeds in suit of April 2 and May 3, 1902, were in effect death-bed gifts, and therefore invalid by Mahomedan law as an attempt to defeat its provisions as to succession. The evidence adduced by him shewed that the diseases of which Goolam Ariff died on May 16 were oppressing him at the dates of the deeds to an extent which brought his mind under the sense of approaching death, and induced him to make gifts which were of a testamentary character. The intention to give to his wives and children was expressed for the first time in March and speedily carried into effect. The medical evidence ought not to be regarded to the exclusion of the evidence of acts and of members of his family and others surrounding him. Even the medical evidence was to the effect that his case was serious, qualified by the statement that it was not imminently fatal. The surrounding facts shewed that he was himself rightly apprehensive of approaching death. It was contended that the Courts below had attached too much importance to the statements as to death being unexpectedly speedy and the doubts as to the extreme gravity of the case. Further, the gifts were not completed by delivery of possession, to effect which some symbolical act indicating change of possession was necessary. They were not intended to take effect till after the donor's death; at least

there was no evidence of any act which unequivocally denoted to the contrary: see Ameer Ali's Mahomedan Law (1904 ed.), pp. 63, 66; *Amina Bibi* v. *Khatija Bibi*. (1) Under such circumstances the gifts were neither bona fide nor completed. They were testamentary dispositions, which required the consent of the other heirs in order to make them completely valid: see Ameer Ali, vol. 1, pp. 36, 468 (3rd ed.); *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon*. (2) Lastly, the gifts were invalid, being in contravention of the Mahomedan law of mushaa. They were gifts of undivided shares in property which was capable of division, and which was not actually and physically partitioned, the gifts, therefore, not being followed by possession. On this subject they referred to the case already cited in L. R. 2 Ind. Ap. 87, and to *Mumtaz Ahmad* v. *Zubaida Jan* (3); *Emnabai* v. *Hajirabai* (4); Ameer Ali, pp. 54, 55.

Sir R. Finlay, K.C., *Jardine, K.C.*, and *J. W. McCarthy*, for the respondents other than Mirian Beebee, the second widow of Goolam Ariff, contended that there were concurrent findings of fact by the Courts below to the effect that Goolam Ariff was not in his death-bed illness, that is, not suffering from the illness which caused his death at the dates of his deeds of gift; and that he was not at that time apprehensive of death. The Courts were justified in relying on the medical evidence and disregarding any vague and indefinite fear of death as reasonable ground for invalidating the gifts. They referred to Sir R. Wilson's Digest (1903 ed.), p. 332, art. 284, expl. 1; Baillie's Digest of Mahomedan Law (2nd ed. 1875), bk. 8, c. 8, of gifts by the sick, pp. 551, 552; Macnaghten's Mahomedan Law, c. 5, p. 51, para. 11; Ameer Ali's Mahomedan Law, vol. 1 (3rd ed.), pp. 24, 26, and c. 18, pp. 469-72; *Muhammad Gulshere Khan* v. *Mariam Begam* (5); *Labbi Beebee* v. *Bibbun Beebee* (6); *Hassarat Bibi* v. *Golam Jaffar* (7); *Enaet Hossein* v. *Kureemoonissa* (8); *Fatima Bibi* v. *Ahmad Baksh*. (9) As to delivery of possession, in the first place actual delivery was not necessary, the gifts being by a husband and father to his wives

(1) (1864) 1 Bomb. H. C. 157.
(2) L. R. 2 Ind. Ap. 87, 99.
(3) L. R. 16 Ind. Ap. 205.
(4) (1888) I. L. R. 13 Bomb. 352.
(5) (1881) I. L. R. 3 Allah. 731.
(6) (1874) 6 Allah. H. C. 159.
(7) 3 Calc. W. N. 57.
(8) (1865) 3 Suth. W. R. 40.
(9) (1903) I. L. R. 31 Calc. 319.

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and minor children; in the second place delivery of possession was made so far as the nature of the property admitted—authority to take possession was given by the donor, who declared in the deeds that he had given possession. He did all that was necessary under the circumstances to divest himself of the property and to vest it in the donees: see *Amina* v. *Khatija Bibi* (1); *Ebrahimbhai Rahimbhai* v. *Fulbai.* (2) With regard to the doctrine of mushaa relied on by the other side, it was submitted that it was inapplicable. It does not apply where the property is indivisible, or where possession has been given. The doctrine must be strictly defined, and it cannot be extended by implication, so as in all cases to prohibit gifts of undivided shares where the property is divisible. Here there were shares in a company and buildings on plots the subject of gift, and invalidity of gift ought not to be declared in virtue of a rule of law which was obsolete so far as it was inapplicable to modern life. Reference was made to *Muhammad Mumtaz Ahmad* v. *Zubaida Jan* (3), in which judgment, it was submitted, a correct and applicable summary of the law of mushaa was given, and it was held that a declaration by a donor of his having given possession binds all who claim under him: *Mullick Abdool Guffoor* v. *Muleka* (4); Ameer Ali (3rd ed.), c. 1, pp. 49, 50; Baillie, pp. 522, 524; Sir R. Wilson's Mahomedan Law, p. 351, ss. 308, 309, 311; *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (5); *Jiwan Baksh v. Imtiaz Begam.* (6)

As to the effect of there having been concurrent findings on all material questions of fact, reference was made to *Allen* v. *Quebec Warehouse Co.* (7); *Ramanugra Narain Singh* v. *Chowdhry Hanuman Sahai.*

Bailhache replied.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The questions raised by this appeal relate to the succession of Goolam Ariff, a wealthy Mahomedan resident

(1) 1 Bomb. H. C. 157.
(2) (1902) I. L. R. 26 Bomb. 577.
(3) L. R. 16 Ind. Ap. 205, 215.
(4) (1884) I. L. R. 10 Calc. 1112, 1122.
(5) L. R. 2 Ind. Ap. 87, 104, 105.
(6) (1878) I. L. R. 2 Allah. 93.
(7) (1886) 12 App. Cas. 101.
(8) (1902) L. R. 30 Ind. Ap. 41.

of Rangoon, who died on May 16, 1902. He left a will dated April 19, 1902, by which he bequeathed his property to his heirs according to Mahomedan law. The controversy between the parties is concerned with the validity of certain deeds of gift, dated April 2, 1902, by which he conveyed to certain of his minor children and wives a certain number of undivided 2000th shares in certain valuable properties. These deeds are attacked by the executor of the will on two main grounds, the first relating to the physical condition of the deceased at the date of execution, the second founded on the law of mushaa, which is said to forbid them. (The attack on the deeds as "colourable" so entirely failed that it is unnecessary to do more than state that it was made.)

The first of these is a pure question of fact; the two Courts have concurred; and each judgment is supported by careful and elaborate reasoning. The law applicable is not in controversy; the invalidity alleged arises where the gift is made under pressure of the sense of the imminence of death.

The difficulty is in applying this to the subtle and conjectural problem of the mental condition of the testator in each case. It would be inappropriate that their Lordships, in reviewing concurrent judgments, should rediscuss the evidence in detail. Goolam Ariff was an elderly man, who had not led a careful life; he suffered, and knew that he suffered, from degeneration of the arteries and of the liver, and he had been sharply ill. His life, therefore, was an old and a bad one. It is highly probable that the execution of the disputed deeds was suggested by his realizing the prudence of setting his house in order, but this is the motive of all wills, and especially of the wills of the old and ailing. Having examined the evidence, their Lordships consider that the conclusion of the Courts was sound.

The other disputed question is of a very different legal quality. The property which the deceased had to dispose of consisted of freehold land in Rangoon and shares in six companies. Their Lordships assume the law of mushaa to apply to the succession of Mahomedans who reside in Rangoon; but the serious question is whether it applies to property of the nature described. What was done by Goolam Arift was this: he (notionally) divided the

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property to be dealt with into 2000 shares; he kept to himself 1150 shares, and the remaining 850 he distributed among the persons to be benefited, giving 200 shares apiece to three of them, 100 shares apiece to two of them, and twenty-five shares apiece to two of them. Now it is said that this gift was void, as being contrary to the doctrine of mushaa. In the first place, even if the duty of the Courts were to construct a prohibition of gifts of undivided shares of what is divisible, which should be applicable to the conditions of modern life, it would seem impossible in the case of the shares, and extremely difficult in the case of freehold property in a town, to carry it out. But the attitude of the law towards this doctrine of mushaa does not involve any such constructive application of the doctrine. It was laid down in the Privy Council case of *Mumtaz Ahmad* v. *Zubaida Jan* (1) that "The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." Their Lordships concur in the conclusion arrived at below, that it would be inconsistent with that decision to apply a doctrine, which in its origin applied to very different subjects of property, to shares in companies and freehold property in a great commercial town. The argument of the appellant was not that the law of mushaa did in fact embrace (in the sense of having been applied to) such property, but that, if the same aspect of life and things were logically applied, it involved the invalidity of the gifts in dispute. But this is not the true criterion.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellant will pay the costs of the appeal.

Solicitors for appellant : *A. H. Arnould & Son.*
Solicitors for respondents : *Bramall & White.*

(1) L. R. 16 Ind. Ap. 207, at p. 215.

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DAYAL MOWJI AND OTHERS . . . . . DEFENDANTS. *Feb.* 6, 7, 8; *July* 22.

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

Sale by Mortgagee—Depreciatory Condition of Sale—Notice to Purchaser—Mortgagees' Solicitor employed to Convey, but not to Purchase—Invalid Sale.

Mortgagees having, in the exercise of their power of sale, prescribed a depreciatory condition, unwarranted by the state of the title:—

Held that, as the purchaser completed his contract for purchase without notice thereof, he was not affected thereby. His employment of the mortgagees' solicitors as his agents subsequently to the contract did not affect him with constructive notice at its date of the true state of the title as known to them.

Held, however, that the sale must be set aside, the evidence shewing that the purchaser bought with notice that the mortgagees, by themselves or their agents, had so conducted themselves with reference to the sale that would-be bidders at it were induced to leave.

APPEAL from a decree of the High Court (June 25, 1904), modifying a decree of Russel J. (February 26, 1903).

The property in suit, viz., the house in Cowasjee Patell Tank Road, was put up to auction on October 8, 1900, and was purchased by the appellant for Rs. 20,500 under a power of sale contained in the mortgage deed, dated April 8, 1896, relating thereto. Notwithstanding protests by the mortgagor, a conveyance thereof was executed by the mortgagees on October 20, 1900, Messrs. Tyabji, Dayabhai & Co. acting as solicitors for both purchaser and mortgagees.

The mortgagor, contending that the sale was not valid, refused to deliver possession to the purchaser, and the appellant in consequence on August 26, 1901, sued in ejectment. The mortgagees were added as defendants.

The respondent mortgagor defended possession, and counterclaimed to have the sale set aside. The mortgagees contended that they had (bona fide) exercised their power of sale, and

* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

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that the mortgagor's action in making them parties was unjustifiable.

Russell J. was of opinion that the 6th condition of sale (which is set out in their Lordships' judgment) was undoubtedly of a depreciatory character, that the mortgagor's title was far better than usually procurable in India, and that no man of ordinary prudence putting up his own property for sale would ever have allowed such a condition to be printed. But he held that the appellant was not affected, as he had not fraudulently colluded with the mortgagees, nor had he distinct notice that owing to the depreciatory condition the sale could be set aside. He, however, considered that the mortgagees had so conducted themselves with reference to the sale that would-be bidders were induced to leave; that the appellant had notice of these circumstances; that the sale was not a bona fide auction sale, and ought to be set aside. He accordingly made a decree dismissing the suit of the appellant, decreeing the counter-claim of this respondent, and directing the execution of a reconveyance by the appellant to the mortgagees.

The High Court in appeal delivered a preliminary judgment and decided that at the time of the sale there was no agreement to postpone; that no postponement was announced by the auctioneer or the mortgagees, or by any one authorized by them to do so; and that the sale could not be set aside on the ground of the improper conduct of the mortgagees in this respect. The High Court was, however, of opinion that the 6th clause in the conditions of sale must of necessity prejudicially affect a sale; that the state of the title did not warrant it; that it was inserted unreasonably, and was not authorized by the terms of the deed of mortgage. It also held that the appellant had notice of the said condition prior to the sale, that it was depreciatory, and that, having bought with notice, he could not resist the right of the mortgagor to redeem either under the provisions of the deed of mortgage or under s. 69 of the Transfer of Property Act (IV. of 1882).

The High Court therefore made one final decree in two suits, viz., the ejectment suit and a redemption suit afterwards brought by the mortgagor. That decree was for redemption and reconveyance. It directed that if the mortgagor failed to redeem he should bear the whole of the costs of both suits, including the

counter-claim and the appeal. In the event of redemption it directed an appropriate apportionment of the costs.

Sir R. Finlay, *K.C.*, and *C. W. Arathoon*, for the appellant, referred to the provisions of the mortgage deed of 1896; to s. 69 of the Transfer of Property Act, to s. 3, which relates to notice; and to s. 229 of the Indian Contract Act; and contended that in the absence of fraud the appellant, as purchaser, was protected. Down to the date of his contract he had no notice, actual or constructive, that the mortgagees had prescribed any condition which was irregular, either as depreciatory of title or on any other ground. They denied that the conditions of sale were in any respect unusual, or stringent, or depreciatory. If there had been a depreciatory condition, objection thereto was not notified or relied on by the mortgagor at the time of sale. The objection was an after-thought. As regards the decision of the High Court that the purchaser had constructive notice of the depreciatory condition, that was solely founded upon the appellant's employment of the mortgagees' solicitors, who knew the title, to draw the conveyance. But at the date of contract, and down to that date, those solicitors were not the appellant's agents, and his contract for purchase could not be affected by any notice obtained subsequently thereto. Knowledge by the agent obtained by him prior to the agency being established cannot be noticed to the principal: see illustration (*b*) to s. 229 of the Indian Contract Act, 1872. The contract was complete, and the deposit paid before the mortgagee's solicitors were employed. The employment, moreover, was to draw the conveyance, not to investigate the title: *Wyllie* v. *Pollen*. (1) The High Court was right on the evidence in finding that the sale had not been postponed.

Cohen, *K.C.*, and *De Gruyther*, for the respondent mortgagor, on the subject of constructive notice referred to s. 54 of the Transfer of Property Act, under which a sale means an actual transfer, and is not complete till the transfer of title is effected, that is, the conveyance executed. Prior to that execution the mortgagees' solicitors had been instructed by the appellant. But they chiefly contended that Russell J. was right on the

(1) (1863) 32 L. J. (Ch.) 782.

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evidence in finding that the sale was not bona fide. The mortgagees had effected a postponement of it under such circumstances that intending purchasers had left the auction, and the purchaser was shewn to have had notice of it. Moreover, the evidence established that the purchaser had actual notice of the depreciatory condition at the time of the sale. Reference was made to *Dance* v. *Goldingham* (1); *Falkner* v. *Equitable Reversionary Society* (2); *Bailey* v. *Barnes*. (3) The Transfer of Property Act, in its provisions respecting notice, is based on the English Conveyancing Act of 1881, s. 21, sub-s. 2; and see *Agra Bank* v. *Barry* (4), where the doctrine of imputing in all cases knowledge possessed by the solicitor to the client who employs him is considered. Reference was also made to the Registration Act, 1877, s. 50; and to *Sharfudin* v. *Govind* (5); *Bhikhi Rai* v. *Udit Narain Singh*. (6)

Cowell, for the mortgagees.

Sir R. Finlay, K.C., replied.

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July 22.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment and decree, dated June 25, 1904, of the High Court of Bombay, sitting on appeal from a judgment and decree passed on February 26, 1903, by Russell J. in exercise of the ordinary original civil jurisdiction of the same Court.

Most of the facts now material to the case are not disputed. On April 8, 1896, the first respondent (hereinafter called the mortgagor) executed a mortgage of certain properties, including premises in Cowasjee Patell Tank Road, in the city of Bombay, which are the subject of this suit and appeal, in favour of the other respondents (hereinafter called the mortgagees) to secure an advance of Rs. 30,000 and interest.

The mortgage was of the English type, and contained a power of sale in an ordinary form. A proviso followed that, "Upon any sale purporting to be made in pursuance of the aforesaid power . . . . the purchaser . . . . shall not be bound to

(1) (1873) L. R. 8 Ch. 902, 910.
(2) (1858) 4 Drew. 352, 356.
(3) [1894] 1 Ch. 25.
(4) (1874) L. R. 7 H. L. 135.
(5) (1902) I L. R. 27 Bomb. 452.
(6) (1903) I.L.R. 25 Allah. 366.

see or inquire whether any such default has been made . . . . or otherwise as to the necessity or expediency of such sale or that the sale is otherwise improper or irregular. And notwithstanding any such irregularity such sale shall as far as regards the safety and protection of the purchaser . . . . be deemed to be within the aforesaid power . . . . and be valid and effectual accordingly and the remedy of the mortgagor . . . . shall be in damages only." This last proviso is in substance an echo of s. 69 of the Transfer of Property Act, 1882.

On October 8, 1900, the mortgagees, purporting to act under the power of sale in the mortgage, caused the property in question to be put up for sale by auction, and it was knocked down to the appellant. On the same day he signed a written contract to purchase; and on October 20, 1900, the mortgagees executed a conveyance to the purchaser.

The mortgagor had remained in possession of the premises; and on August 26, 1901, the purchaser instituted the present suit in the High Court. The claim was for possession of the premises in question and for other connected relief. The original defendant was the mortgagor alone, on whose application the mortgagees were subsequently added as defendants.

Another suit was brought by the mortgagor against the mortgagees, in which he claimed to redeem the property in question and to recover damages. This suit was brought up, with the necessary amendments, before the Court of Appeal, so that it might be dealt with in one decree together with the principal suit. This was done, and it is necessary to mention the circumstances only in order to appreciate the decree of the Court of Appeal. For the purposes of the present appeal the matter is not material.

It is unnecessary to examine the further pleadings or the issues settled. It is enough to say that the case came on for hearing before Russell J., and that at the trial what had to be determined, stated broadly, was whether the sale was such, under the circumstances, as to give a good title to the purchaser as against the mortgagor. Russel J. held that it did not, for reasons that will shortly be examined. The Appeal Court came

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to the same conclusion, but for different reasons, which will also be considered.

In the earlier stages of this litigation many points were raised relating to the circumstances of the sale, but these have all now been eliminated except two. The remaining two are those which formed the basis of decision in the two Courts below respectively.

Of these points the one that naturally comes first in order is this: The 6th of the conditions of sale said that, "The purchaser shall accept such title as the vendors can give, and shall not require the vendors to enter into any other covenant except a covenant that they have not incumbered, and shall not raise any question or objection to the title, and shall be held bound to accept such title as the vendors possess." Both the Courts in India held this to be a depreciatory condition, wholly unwarranted by the actual state of the title. So far they are agreed. Russell J., however, held that there was nothing in the facts to affect the purchaser with notice or knowledge of the depreciatory character of the condition. The Court of Appeal, on the other hand, held that the purchaser was affected with constructive notice of the true state of the title, by reason of the fact that, some days after the contract of sale was completed, the purchaser instructed the mortgagees' solicitor to act for him in the preparation of the deed of conveyance, and that that solicitor knew enough of the real title to shew that the condition in question was unjustifiable.

When the contract of sale was signed the transaction was completed so far as it rested in contract, and the rights and liabilities of the parties arising out of that contract were ascertained and were enforceable. Down to that point the attorney was not acting for the purchaser. The only thing in which he did so act was the subsequent preparation of the conveyance. The view of the Court of Appeal imputes to a principal the knowledge of an agent, not acquired in the matter for which he was agent, and uses it to upset a transaction of a date before the agency commenced. This is an extension of the doctrine of constructive notice in which their Lordships cannot concur. They therefore think the judgment and decree under appeal cannot

be supported on the grounds relied upon by the Court of Appeal.

The only point that remains to be considered is that which formed the ground of Russell J.'s judgment. To appreciate the point it is necessary to refer briefly to what occurred on the day of sale. The sale was announced for 4.30 o'clock, and it seems to have actually commenced soon after 5. The bidding was at first pretty brisk, and reached the sum of Rs. 20,500, which was bid by the purchaser, the now appellant.

At this point the sale was in fact stopped, and the parties concerned retired to an adjoining wood-shed, where they spent about half an hour endeavouring to agree to written terms of settlement. The endeavour failed, and then the auctioneer, by the instructions of the mortgagees' solicitor, purported to resume the sale. The purchaser's previous bid of Rs. 20,500 was called out several times, and, no competitor appearing, the property was knocked down to him at that price. This is said to have happened at 6.10.

It was contended that the sellers, who unquestionably stopped the sale, did so under such circumstances as naturally to lead bidders to suppose that the sale was over at least for that occasion, and to go away from the place of auction. It was said that the bidders did go away when the sale was stopped ; and that the purchaser, who was present, and who saw and heard what passed, was affected with notice of the impropriety of the alleged sale. The case thus indicated was, if established, sufficient to invalidate the sale.

The questions thus raised were questions of fact. The evidence was both voluminous and conflicting. Russell J., who saw and heard the witnesses, examined that evidence in his judgment with great care, and has indicated in more than one passage of that judgment his estimate of the comparative credibility of witnesses. The case is peculiarly one in which their Lordships would be reluctant to reject the finding of the learned judge who tried the case, provided that there was sufficient evidence to support his finding. Their Lordships think there was ample evidence to support the finding of the learned judge and that his conclusion from that finding is correct. That finding and

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that conclusion are thus stated: "The defendants 2 and 3 (the mortgagees) by themselves or their agents so conducted themselves with reference to this sale that would-be bidders at it were induced to leave. The plaintiff (the purchaser) had notice of those circumstances, using the word notice as it is defined in the Transfer of Property Act. He therefore bought at his peril, and as the sale was not a bona fide auction sale it must be set aside."

For the foregoing reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the first respondent, and the mortgagees will bear their own costs.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitors for respondent mortgagor: *Payne & Lattey.*

Solicitors for respondent mortgagees: *Ashurst, Morris, Crisp & Co.*

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April 24, 25; *July* 22.

VASUDEVA MUDALIAR AND OTHERS . . DEFENDANTS;

AND

K. S. SRINIVASA PILLAI AND ANOTHER . . PLAINTIFFS.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Law of Mortgage—Foreclosure—Limitation—Act XIV. of 1877, *Sched. II., arts.* 132 *and* 147.

In a suit upon a mortgage or hypothecation bond (now described in the Transfer of Property Act as a simple mortgage) to enforce payment of the amount due thereunder by sale of the mortgaged property:—

Held, that art. 132 of the Limitation Act of 1877 provides the applicable rule of limitation, namely, a period of twelve years.

Art. 147, which provides a period of sixty years for suits for foreclosure or sale, is on its true construction applicable only to English mortgages.

APPEAL from a decree of the High Court (March 13, 1905), varying a decree of the Subordinate Judge of Negapatam (February 17, 1902).

**Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

The suit was brought on September 23, 1899, by the first respondent against the appellants to recover the principal and interest due under an instrument of mortgage dated September 22, 1883. The plaintiff was the receiver appointed by the Court in a suit for the partition of the family property of the mortgagees. Under the decree in the partition suit the interests of the family in the mortgage, and the debt secured thereby, fell to the share of the second respondent, who was accordingly brought on to the record.

The Subordinate Court passed a decree for Rs. 10,605.12.6, together with further interest. On appeal the High Court, in substitution for the said decree, passed a decree for Rs. 46,341.12, together with subsequent interest and costs.

On September 22, 1883, the first and third appellants, who are respectively the fathers of the other appellants, executed the instrument above referred to, to secure the repayment of a sum of Rs. 8,000, as therein provided, to one Krishna Mudaliar, who was the managing member of the family of the second respondent. After reciting that the sum of Rs. 8,000 was owing by the obligees, as therein mentioned, the document proceeded as follows: "The said sum shall bear interest at $\frac{3}{4}$ per cent. per mensem, ane we shall pay the interest of each year by the 30th Panguni of that year, and the principal at the rate of Rs. 1,000 per annum from this date. In default of our paying the principal and interest as aforesaid, compound interest, calculated at $\frac{5}{8}$ per cent. per mensem, with twelve months rests from the date succeeding that of default on the aggregate principal and interest due till then, and the principal amount shall, on demand by you, be paid by us without reference to the term." The annual instalments of Rs. 1,000 were not paid by the mortgagors. But payments were made by them at various dates from 1885 to 1890; and the mortgage account was alleged in the plaint to have been settled on October 14, 1889, between the parties, and the sum of Rs. 11,092.9.4 to have been found due. The plaint also alleged that subsequent to that date payment had been made on account of interest, and that in a partition suit between the appellants there had been an acknowledgment of liability.

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The partition suit was brought in 1898, and the receiver appointed therein sued the appellants on September 23, 1899.

The Subordinate Judge held that the suit was prima facie barred by limitation, the period of limitation being twelve years from the date of the first default. He decided that there had been no settlement of accounts, no part payment of interest, and no acknowledgment of liability sufficient to extend the said period of limitation. He was, however, of opinion that, the debt being payable by instalments, the last five instalments from September 22, 1887, were recoverable within twelve years from the date on which each of the said instalments fell due. He held that the benefit of the clause in the deed of mortgage, which provided that on default of payment of any instalment the whole amount should become due and recoverable, could be and had been waived by the mortgagee, and required a demand for payment by the mortgagee as a condition precedent for enforcement. He considered any personal claim against the mortgagors was barred by limitation, and made a decree in favour of the plaintiff for payment of "the five instalments and interest on each of these instalments, with interest thereon from the time each instalment fell due as per contract, and after term at contract rate of 12 annas per cent. per mensem up to realization," to be recovered by sale of the mortgaged property.

The High Court in appeal held that the document sued upon was an instrument of mortgage as opposed to an instrument creating merely a charge within the meaning of the Transfer of Property Act, and that the rule of limitation applicable was the sixty years rule under the Limitation Act, 1877, Sched. II., art. 147, and that none of the claim was barred by limitation. They accordingly passed a mortgage decree for Rs. 46,341.12, but they gave no personal decree against the defendants.

De Gruyther, for the appellants, contended that the suit was barred by limitation. Art. 132 applied, and not art. 147. He referred to *Shib Lal* v. *Ganga Prasad* (1); *Girwar Singh* v. *Thakur Narain Singh*. (2) Art. 147 only applies to English

(1) (1884) I. L. R. 6 Allah. 551. (2) (1887) I. L. R. 14 Calc. 730.

mortgages, and should be construed irrespective of definitions contained in the Transfer of Property Act. Simple mortgages existed before that Act : see Macpherson on Mortgages, p. 14. He referred to Act IX. of 1871, art. 132 of which Act is differently worded from art. 132 of the present Act ; and there is nothing in the earlier Act which corresponds to art. 147 of the later, which was intended, according to its true construction, to be of limited application. There was no intention to make a wide alteration in the law. He referred to *Ramdin* v. *Kalka Pershad* (1) ; Act XIV. of 1859, clause 16, s. 1 ; *Juneswar Dass* v. *Mahabeer Singh.* (2) In 1877 there was no suit for foreclosure except on English mortgages ; but a suit for money charged on immovable property was a well-recognized class of suit. A suit for possession was required to extinguish the mortgagor's interest under Indian mortgages, which were mostly by conditional sale, foreclosure being an inappropriate remedy : see *Forbes* v. *Ameeroonissa Begum* (3) ; *Ganpat Pandurang* v. *Adarji Dadabhai.* (4) In 1877 the Civil Procedure Code of that year provided a form of plaint, No. 109, for foreclosure or sale applicable to simple mortgages. The construction of art. 147 adopted by the Calcutta Courts is correct : see *Modun Mohun Chowdhry* v. *Ashad Ally Baheree.* (5) In Act IV. of 1882 special definitions of mortgage and charge are given : see ss. 58 and 100 ; but as this was five years after the Limitation Act they do not affect its construction. See also *Girwar Singh* v. *Thakur Narain Singh*(6); *Ramachandra Rayaguru* v. *Modhu Padhi* (7) ; *Narayana Ayyar* v. *Venkataramana Ayyar.* (8) The Bombay Courts, on the other hand, have followed the decision of the Allahabad High Court : see *Motiram* v. *Vitai* (9) ; *Datto Dudheshwar* v. *Vitha.* (10)

Cohen, K.C., and *Kenworthy Brown*, for the second respondent, contended that art. 147 was the applicable provision, and that the suit was not barred. That article is not confined to English mortgages. The two Acts of 1871 and 1877 differ materially.

(1) (1884) L. R. 12 Ind. Ap. 12.
(2) (1875) L. R. 3 Ind. Ap. 1.
(3) (1865) 10 Moo. Ind. Ap. 340.
(4) (1877) I. L. R. 3 Bomb. 312.
(5) (1883) I. L. R. 10 Calc. 68.
(6) I. L. R. 14 Calc. 730.
(7) (1898) I. L. R. 21 Madr. 326.
(8) (1902) I. L. R. 25 Madr. 220, 238.
(9) (1888) I. L. R. 13 Bomb. 90.
(10) I. L. R. 20 Bomb. 408.

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The action in this case was by a mortgagee to obtain a decree for sale, and under a transaction of this sort the Court has always had power to sell. It was always considered a simple mortgage, not merey under the Transfer of Property Act—see ss. 69, 58 and 100—but previously: see *Forbes* v. *Ameeroonissa Begum* (1), where its character and incidents are discussed. See also *Ganpat Pandurang* v. *Adarji Dadabhai* (2); *Karan Singh* v. *Bakar Ali Khan* (3); *Shib Lal* v. *Ganga Prasad.* (4) Art. 147 applies to any suit by a mortgagee for sale, which includes any case in which the plaintiff stands to the defendant in the relationship of mortgagee and mortgagor. Art. 148 allows a mortgagor sixty years in which to redeem, and it is reasonable to suppose that the Legislature intended that the mortgagee should have a similar period in which to foreclose or sell. The Transfer of Property Act must be read into the Limitation Act, for it contains the substantive law as to what is a charge and what is a mortgage. They referred to *Girwar Singh* v. *Thakur Narain Singh* (5); *Nilcomal Pramnath* v. *Kamini Kumar Basu* (6); *Kishan Lal* v. *Ganga Ram* (7); and the cases in 21 and 25 Madr. referred to on the other side. With regard to Form 139 in the Civil Procedure Code, 1877, it refers only to the case of an English mortgage; the section must be referred to as well as the form. If art. 132 governs the case, the period of limitation should be computed with reference to the dates of settlement of accounts, acknowledgments, and payments. Demand should be made before action brought, and limitation runs from demand: see *Hanmantram Sadhuram Pity* v. *Bowles* (8); *Netta Karuppa Goundan* v. *Kumarasami Goundan.* (9) Then, as regards s. 19 of Act XIV. of 1877, an acknowledgment need not be made to a creditor: *Maniram Seth* v. *Seth Rupchand* (10); *Moodie* v. *Bannister* (11); *Motiram* v. *Vitai.* (12) With regard to s. 74 of the Indian Contract

(1) 10 Moo. Ind. Ap. 340, 346.
(2) I. L. R. 3 Bomb. 312, 330.
(3) (1882) I. L. R. 5 Allah. 5.
(4) I. L. R. 6 Allah. 551.
(5) I. L. R. 14 Calc. 730.
(6) (1891) I. L. R. 20 Calc. 269.
(7) (1890) I. L. R. 13 Allah. 28, 41, 47.
(8) (1884) I. L. R. 8 Bomb. 561, 566.
(9) (1898) I. L. R. 22 Madr. 20.
(10) (1906) L.R. 33 Ind. Ap. 165.
(11) (1859) 4 Drew. 432.
(12) I. L. R. 13 Bomb. 90, 94, 96.

Act, relating to penalty, reasonable compensation is to be ascertained having regard to the terms of the transaction : see *Rani Sundar Koer* v. *Rai Sham Krisher* (1) ; *Clydebank Engineering &c., Co.*, v. *Don Jose Ramos Yzquierdoy Castaneda.* (2)

De Gruyther replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court of Madras, dated March 13, 1905, modifying those of the Subordinate Judge of Negapatam of February 17, 1902.

The controversy arises out of a mortgage executed on September 22, 1883, by the first and third appellants in favour of Krishna Mudaliar Avergal, to secure Rs. 8,000 and interest as stipulated. The mortgage was of the kind long known as a mortgage bond or hypothecation bond, and now described in the Transfer of Property Act as a simple mortgage.

In the course of a partition suit, relating to the estate of the mortgagee, the first respondent was appointed receiver of that estate, and as such he instituted the present suit, joining as defendants the two actual mortgagors and their respective sons, which four persons are now the appellants. The object of the suit, so far as it need now be noticed, was to enforce payment of the amount due under the mortgage, by sale of the mortgaged property.

In carrying out the partition the claim now in question was allotted to the now second respondent, whereby he became the person really interested in the claim. Accordingly he was made a party to this appeal, by order of the High Court, and he is the contesting respondent.

The only issue in the case which need be noticed was whether the suit was barred by limitation, and the principal question discussed on the argument of this appeal (the only one on which their Lordships propose to express an opinion) is whether the period of limitation applicable to such a case is sixty years, under art. 147 in the Second Schedule to the Indian Limitation Act (XV. of 1877), as held by the High Court, or twelve years, under art. 132, as contended for by the appellants.

(1) Ante, p. 9.

(2) [1905] A. C. 6.

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This question is one as to which there has been great diversity of opinion among the several High Courts in India for many years past, almost from the time of the passing of the Act of 1877. If there had been a uniform current of decision in India upon such an Act and for such a period of time, their Lordships would have been very slow to interfere. But though the Act to be construed is one applicable to India generally, and must bear the same meaning everywhere, different and conflicting views have so far prevailed in the different provinces of India. Their Lordships have therefore no alternative but to decide between the conflicting opinions.

The two articles in question run thus:—Art. 132: Suit "to enforce payment of money charged upon immovable property," "twelve years." Art. 147: Suit "by a mortgagee for foreclosure or sale," "sixty years."

Before balancing the two views which have been taken of the effect of these articles, it may be well to see how the law stood when they were passed. The previous Act was Act IX. of 1871, in which art. 132, referring to suits "for money charged upon immovable property," was practically the same as the present article bearing that number. There was nothing corresponding to art. 147. Under that state of things it was perfectly settled law that suits of the present class were governed by art. 132, whilst some uncertainty had been felt as to the rule of limitation applicable to another class of mortgage, the English mortgage.

The two views taken under the Act of 1877 are these: According to one view, art. 147 applies to every suit by a mortgagee, in which he asks either for foreclosure or for sale. According to the other view, art. 147 applies only to the class of mortgages (English mortgages) in which the suit may be, and in fact always is, brought for "foreclosure or sale," while art. 132 means what the corresponding article meant before.

In support of the first of these constructions, reliance has mainly been placed upon the view that the terms of art. 147 require its acceptance, and that the other construction is not a legitimate construction, as not giving fair effect to the language used. If this be so it is of course conclusive. But their

Lordships think it is not so. They are of opinion that the narrower construction of art. 147, limiting its application to the one class of mortgages in which alone the suit can be, and always is, brought for "foreclosure or sale," is a legitimate construction, and gives reasonable effect to the language used.

That being so, their Lordships think that the reasons for adopting the narrower interpretation of art. 147 greatly outweigh those on the other side. The preponderating considerations, in their Lordships' opinion, are the following. The narrower construction escapes the necessity of attributing to the Legislature a great and sudden change of policy. It also gives effect to the ordinary presumption that the Legislature, when it repeats in substance in a later Act an earlier enactment, that has obtained a settled meaning by judicial construction, intends the words to mean what they meant before. The other construction fails in both these particulars.

One argument urged for the respondent calls for notice. It was said that, whatever might have been the original operation of the Limitation Act of 1877, the effect of art. 147 might be extended by the subsequent passing of the Transfer of Property Act in 1882, so as to make the article apply to everything which was declared to be a mortgage by the later Act. This contention appears to their Lordships to assume the very point in controversy, namely, that art. 147 purports to apply to every suit on a mortgage, in which there is claim for foreclosure or for sale.

Their Lordships will humbly advise His Majesty that it should be declared that art. 132 is the article which provides the rule of limitation applicable to this case, and that the case should be remitted to the High Court to be disposed of in accordance with this declaration.

The second respondent will pay the costs of this appeal.

Solicitor for appellants : *Douglas Grant.*

Solicitors for second respondent: *Lawford, Waterhouse & Lawford.*

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May 3, 7; *June* 7; *July* 3.

SHAHZADI BEGAM (SINCE DECEASED) AND OTHERS . . . . . } APPELLANTS;

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Indian Evidence Act—Admissibility of Evidence—Ancient Pedigree—Certified Copy of Deed of Exchange.

Upon a claim by two of the appellants to letters of administration to the estate of a deceased Mahomedan, the issue arose whether his ancestress was the uterine sister of the said appellants' ancestor, and thereunder two documents, a genealogical table, and a certified copy of a deed of exchange, dated January, 1782, were put in evidence, either of which was conclusive in the appellants' favour if admissible and genuine. The pedigree had been filed in 1804 in a suit in which the said ancestress had established title to the property in suit; and was not objected to before the trial judge:—

Held, on examination of the evidence that the District Judge was right in holding these documents to be genuine, that both were admissible, and that with regard to the pedigree it was too late to object to its admissibility in the High Court.

APPEAL from a decree of the High Court (August 26, 1903), reversing a decree of the District Court of Dacca (February 13, 1900).

The question in the appeal is whether the appellants Shahzadi Begam and Puti Begam were entitled to letters of administration to the estate of one Mir Amir Ali Khan, who died at Dacca on October 30, 1897. The two appellants on November 30, 1897, applied in that behalf to the District Court of Dacca, claiming the letters on the ground that they were the next heirs of the deceased. This application was opposed by the Secretary of State for India in Council, who alleged that the deceased had died without leaving any heir, in consequence of which his estate had escheated to Government. The dispute resolved itself into the proof of a pedigree which shewed that the deceased Amir Ali Khan was great-grandson or third in descent from Haidari Begam, and

* *Present*: LORD ROBERTSON, LORD COLLINS, and SIR ARTHUR WILSON.

that Shahzadi Begam and Puti Begam were third in descent from Mirza Mahsum, who on the face of the pedigree was uterine brother to Haidari Begam. The pedigree also shewed that Haidari Begam was one of six children of Nawab Sarfaraz Khan, four of whom, including Haidari and Mirza Mahsum, had left descendants, but that at the death of Amir Ali Khan all the persons named in the pedigree were dead except the two appellants. It was finally admitted that the appellants and the deceased were respectively descended from Mirza Mahsum and Haidari, and the contention in appeal was limited to the issue whether the former was brother of the latter.

The District Judge held that the appellants were next of kin of the deceased, and directed that letters of administration should issue to them under Act V. of 1881. The High Court reversed this decision, holding that the appellants had not proved themselves to be next of kin.

Part of the estate of the deceased consisted of a share in Jowar Barim taluq, which had formerly vested in Haidari Begam. In 1797 one Mirza Mahomed obtained possession of the taluq. Suits were brought against him in consequence, and amongst them a suit by Haidari Begam, in which she claimed a 13½ annas share, and obtained a final decree in 1808 for a 5 annas and 2 couries share jointly with her three surviving brothers. In that litigation a pedigree was filed by Haidari Begam which shewed that Mirza Mahsum was her brother.

A copy of this pedigree and a certified copy of a deed of exchange disclosing the same relationship, and dated January 17, 1782, were adduced in evidence—the first Court finding them to be genuine and admissible, the High Court finding them to be forgeries.

The reasons of the District Judge, which were approved by their Lordships, are as follows:—

"As for the ewaznama, its appearance shews that it bears the seal of the District Judge's Court at Dacca, and the signature of Mr. Davidson, who was then the judge. . . . . It comes from Shahzadi Begam, in whose custody, apparently, it has been for many years; and there is evidence that Shahzadi Begam is living on the site of the old house and near the tank referred to

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in this document, which is still called Mirza Mahomed Mahsum's tank. Shahzadi Begam and other witnesses say so, and this same tank is referred to in [another exhibit].

"As for the kursinama, the circumstances under which this was first filed before the Collector of Mymensingh are reasonable enough, namely, to rebut the false pedigree filed by Mirza Mahomed and Hayatunnissa in their suit before the appellate Court; and it may be taken as included in the general item 'Persian documents' entered in the list setting forth the papers filed in that record. The fact therein stated that Mirza Mahomed Mahsum was the uterine brother of Fatema Bibi and Haidari Begam is corroborated by the ewazpatra; and beyond the delay that occurred in applying for copies of this document, no valid reason has been shewn why this Court should reject the same as a forgery. This document also shews that Amina Khanum and Miskina Khanum, through whom Shahzadi Begam and Puti Begam claim descent as set forth in the decision on the second issue, are the daughters of this same Mirza Mahomed Mahsum. I therefore find on this evidence that Mirza Mahomed Mahsum and Haidari Begam were brother and sister, and there is reason to believe that the brother predeceased the sister."

Sir R. Finlay, K.C., and *De Gruyther*, for the appellants, contended that Shahzadi and Puti had sufficiently established their title as next heirs to the deceased Amir Ali Khan. It was proved by the evidence, independently of two documents which were mainly relied on, viz., a kursinama, or genealogical table, which disclosed that the ancestor of the appellants and the ancestress of the deceased were uterine brother and sister, and a certified copy of an ewaznama, or deed of exchange, dated in January, 1782. The former was filed in Court in 1804 in a suit brought by Haidari Begam, the ancestress of the deceased, and her brothers and sisters to recover their shares in certain property which had come into the possession of third parties, viz., Mirza Mahomed and his wife. Decrees were made on the strength of this pedigree in their favour by the Provincial Court in 1807 and by the Sudder Dewani Adawlut in 1808. Haidari's share so recovered formed part of the estate of the deceased:

see *Mirza Mahomed* v. *Jareutozzohra*. (1) The High Court was wrong in holding that this pedigree was forged and that it was inadmissible in evidence : see *Jagatlal Singh* v. *Jageshar Baksh Singh*. (2) The pedigree in this case was made with Haidari's knowledge and belief by the pen of her gomasta. The statement as to relationship was therefore made by her authority, and was admissible as made by herself : see s. 32, clause 5, of the Indian Evidence Act (I. of 1872). Besides, its admissibility was not objected to in the first Court, and the grounds on which it was rejected by the High Court were inadequate. The High Court was also wrong on the evidence in finding that the ewaznama was also a forgery. The certified copy obtained in 1851 was admissible : see ss. 4 and 79 of Act I. of 1872. It must be presumed to be genuine until proved to be a forgery, and for this proof the evidence was wholly insufficient. Its effect was to corroborate the evidence of the pedigree as to the relationship in question.

Cohen, K.C., and *Kenworthy Brown*, for the respondent, contended that the High Court was right on the evidence in finding these two documents to have been forged. There was nothing to shew that the kursinama was more than thirty years old, and its genuineness had therefore to be satisfactorily proved by those who relied on it. It could not be presumed : see Act I. of 1872, s. 90. If genuine they were not admissible in evidence : see Act I. of 1872, s. 32, clause 5 ; *Sangram Singh* v. *Rajan Bibi* (3) ; *Jagatpal Singh* v. *Jageshar Baksh Singh*. (4) Moreover, the judgment in 1 Sel. Rep. 243 did not refer to any kursinama filed by Haidari. As regards the ewaznama, no evidence had been given of the execution of the original deed. Till the execution had been proved, a certified copy of it was not admissible under ss. 74 and 79. Neither document had been registered, as was possible, and perhaps requisite, under Regulation XX. of 1812 and Regulation XXXVI. of 1793, ss. 2, 3 (clauses 2, 3, 4, 5 and 6), and ss. 4, 5, 9 and 10. According to *Salimatul Fatima* v. *Koylashpoti Narain Singh* (5), registration, if effected, was insufficient to prove these documents.

(1) (1808) 1 Macn. Sel. Rep. 243.
(2) (1902) L. R. 30 Ind. Ap. 27, 33, 34.
(3) (1885) L. R. 12 Ind. Ap. 183.
(4) L. R. 30 Ind. Ap. 27, 31, 34.
(5) (1890) I. L. R. 17 Calc. 903.

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Sir R. Finlay, K.C., replied, citing *Khetterchunder Mookerjee* v. *Khettu Paul Sreetarutno* (1) to shew that the certified copy objected to was admissible without proof of execution of the original, and pointing out that under the regulations referred to registration was optional.

The judgment of their Lordships was delivered by

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July 3.

LORD COLLINS. The plaintiffs in this case, Shahzadi Begam and Puti Begam, claimed to be the heirs of one Mir Amir Ali Khan, who died on October 30, 1897, intestate. The claim was opposed by the now respondent, who contended that the deceased had left no heir, and that his estate had escheated to the Government. There were numerous other claimants, whose cases were successively dismissed by the District Judge of Dacca. He decided, however, that the plaintiffs had proved their case, and granted administration accordingly. On appeal by the Secretary of State to the High Court at Fort William, the decision of the District Judge was overruled. Hence the present appeal. Since this appeal was entered, viz., on June 9, 1904, Shahzadi Begam died, and by an order of the High Court of May 16, 1905, on the application of the respondent, the appeal was allowed to proceed at the risk of the surviving appellants, viz., Puti Begam and two other persons, who had purchased from the plaintiffs nearly the whole of the interests acquired by the latter on the death of Mir Amir Ali. On April 25, 1906, Puti Begam, the other plaintiff, died, and by an order of His Majesty in Council of December 21, 1906, her legal representatives were substituted as appellants in her place.

When the suit first came before the District Judge a very wide field of controversy was open, and three issues were framed by him as arising for decision as to the descent and relationship of the parties, all which issues he decided in favour of the plaintiffs. On the hearing in the High Court the findings as to two of these issues were accepted by the now respondent, and the area of controversy has thus been most materially narrowed. In order to make the point left in dispute intelligible, it will be necessary

(1) (1880) I. L. R. 5 Calc. 886.

to state as shortly as possible what was the alleged relationship of the parties.

The plaintiffs contended, and it must now be taken as admitted, that the deceased was the great-grandson of a lady called Haidari Begam, said to have been a daughter of Nawab Sarfaraz Khan. It must also now be taken as established that the plaintiffs Shahzadi Begam and Puti Begam were the great-granddaughters of one Mirza Mahsum, said to be a son of the same Nawab Sarfaraz Khan and brother of Haidari Begam. The point in dispute is that which was formulated by the District Judge as the third issue, viz., was Mirza Mahsum the uterine brother of Haidari Begam? If he was, it is admitted that the plaintiffs' claim is established, and it is not necessary to follow out the family history further. The learned judge had before him evidence both oral and written, and as part of the latter two documents, either of which, if admissible and genuine, has been treated by both sides as conclusive upon the issue in the plaintiffs' favour. They are what has been called a kursinama, or genealogical table, and a certified copy of an ewaznama, or deed of exchange, dated January, 1782. The kursinama purported to have been filed in a suit in 1804, in which Haidari Begam had established her right to a share in a certain taluq which had come to her sister Fatema, alias Bukshi Begam, from her husband, Mirza Bakar, in lieu of dower. On the death of Fatema, one Mirza Mahomed, the husband of Hayatunnissa Begam, who owned a certain share in the taluq, took forcible possession of Fatema's share to the exclusion of Haidari and her co-plaintiffs, described in the decree as "the full brothers and sisters" of Fatema. Mirza, in support of his claim, had put in a fictitious pedigree, and it was to rebut this that the kursinama now in question was said to have been filed by Haidari. The result was a decree upholding the claims of Haidari and her co-plaintiffs, and it is to the share thus adjudicated to Haidari that the deceased Mir Amir Ali Khan ultimately succeeded, and that is the subject of the present litigation. The kursinama was filed in this suit by the plaintiffs on January 10, 1899. What purported to be the original was produced at the trial. It does not appear that any objection was made to its admissibility,

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though that point has been strongly pressed before their Lordships. It was, however, contended that it was a forgery concocted some hundred years later, after this suit had begun, and though this view was rejected by the District Judge, it found acceptance in the High Court. The latter Court drew the inference, contrary to the finding of the District Judge, that Haidari Begam had not filed a kursinama at all in the suit of 1804, and thought they detected a tremor in the signature of the Collector, Mr. Legros, not visible in his signature on other papers in the same record. They also placed some reliance on the fact that it did not purport to have been indorsed, but it was pointed out to their Lordships that the same observation might have been made with regard to all the other original documents produced from the same record. Another point seems to have weighed heavily with them, viz., that the plaintiffs, though they had applied as early as January, 1898, for copies of certain documents relating to the proceeding of 1804, did not apply for the kursinama till January 9, 1899. But this delay was clearly explained by Mr. De Gruyther, who referred to the order of the District Judge, who, finding that he had a great many applicants to deal with in July, 1898, postponed the hearing of Shahzadi Begam's case till January, 1899. Their Lordships are by no means satisfied that the grounds upon which the High Court rely support the inference which they draw that Haidari never did put in a kursinama. On the contrary, it seems to their Lordships that the terms of her petition make this suggestion improbable. She says : "After their death the said Mirza filed a feraz contrary to the kursinama and obtained a decree." The High Court suggest that the words in the original do not involve the insertion of the definite article before kursinama which appears in the English translation; but, be this as it may, she is clearly asserting a contrariety between the feraz put forward by Mirza and the pedigree for which she is contending, with the result that the decree which was made and affirmed divided the estate among the persons who are shewn on the kursinama now produced to have been the heirs of Fatema Begam. Having carefully weighed the arguments on both sides as to the genuineness of the kursinama, their Lordships are clearly of opinion that the difficulties in accepting the theory

of the High Court far outweigh those involved in the contrary hypothesis, and they therefore adopt the opinion on this point of the learned judge who tried the case. Their Lordships are further of opinion that it is now too late for the respondent to take an objection to the admissibility of a document which was received without objection at the trial.

With regard to the ewaznama, or deed of exchange, a certified copy of it was produced from the custody of Shahzadi Begam, and was found to be written on paper bearing the same stamp and water-mark as the other contemporary documents in the record of that litigation. Their Lordships agree with the District Judge that it was admissible in evidence, and, for the reasons given by him, adopt his conclusion as to its genuineness. Though these two documents, together or separately, might suffice to decide the issue in the appellants' favour, their case by no means rests on these documents alone. On the contrary, the oral evidence and the documents other than the two named would, in their Lordships' view, suffice of themselves to raise a strong presumption in favour of the appellants. The High Court seem to have under-estimated the weight given by the trial judge to these elements in the case. Shahzadi Begam, in an examination extending over ten days, in which she displayed very remarkable gifts of memory and intelligence, gave evidence which, if it can be relied upon, proved the plaintiffs' case. She was a lady of about eighty years of age, and was thoroughly at home in the family history, a large part of which was covered by her own life, and she deposed to the relationship of Mirza Mahsum, from whom she and her co-plaintiff, Puti Begam, were descended, to Haidari, the ancestress of the deceased Mir Amir Ali, as children of Yusuf Ali, alias Feda Ali Khan, afterwards known as Nawab Sarfaraz Khan, giving the names of Fatema and the other children who appear as her heirs in the decree in the taluq suit in 1804. According to her story she had learnt the family history before her own time largely from conversations with her grandmother, Miskina Khanum. She was quite unshaken on cross-examination. The District Judge evidently regarded her as trustworthy, for he relies in terms upon her statement as to one link in the chain of the family history.

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In addition to the evidence of this lady there was also that of Gholam Mustafa, an ex-pleader and honorary magistrate, to whom the learned District Judge refers favourably, who spoke to the terms of acknowledged blood-relationship which had existed between the deceased and Shahzadi Begam.

Besides this oral evidence there were the other documents referred to by the learned judge in his judgment, which confirm the common descent of the claimants and the deceased from Nawab Sarfaraz Khan, e.g., exhibits F. 2, F. 3, F. 8, F. 9, F. 10, F. 11, and F. 13.

Their Lordships will therefore humbly advise His Majesty that the decree of the High Court be reversed, and the decree of the District Judge restored, and that the respondent pay to the appellants their costs of the appeal to the High Court.

The respondent will pay to the appellants the costs of the appeal to His Majesty in Council.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitor for respondent: *Solicitor, India Office.*

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